

REMARKS/ARGUMENTS

Claims 1-8, 10-33, 35-48, 50, 51 and 53-55 are pending in the application. The Examiner has rejected claims 1-3, 5, 10-13, 15-19, 23-30, 35, 36, 45, 50, 53 and 54. The Examiner has objected to claims 4, 6-8, 14, 20-22, 31-33, 46-48 and 51. The Examiner has allowed claims 37-44 and 55. Applicant has amended claims 36 and 54. Applicant respectfully requests reconsideration of pending claims 1-8, 10-33, 35, 36, 45-48, 50, 51, and 53-55.

Replies to Examiner's Notice of Non-Compliant Amendment (37 CFR 1.121)

In a notice of non-compliant amendment (37 CFR 1.121), the Examiner states, "Claim 45 is not amended as cited on pages 16, 17 of the Remarks." Applicant notes claim 45 has been amended in response to the non-final Office action of August 20, 2010. Applicant has rephrased Applicant's reference to the amendment of claim 45, which Applicant submits obviates the Examiner's notice of non-compliant amendment. Moreover, Applicant submits the Examiner does not identify any portion of 37 C.F.R. § 1.121 with respect to which the Examiner considered Applicant's previously filed response to the final Office action to be non-compliant. Applicant notes the amendment of the claim 45 is the sole issue the Examiner raised in the notice of non-compliant amendment. Thus, Applicant submits Applicant's response is compliant with all applicable requirements. Accordingly, Applicant respectfully requests the Examiner consider Applicant's response as set forth below.

Amendment of claim 36:

Applicant has amended claim 36. Applicant submits support for the amendment exists in the application as originally filed, for example in paragraph [0014], or, as another example, in paragraphs [0018] and [0019], or, as yet another example, in paragraph [0020]. While the Examiner cited "(see column 6 lines 21-25)" of the Harper '398 reference in alleging teaching as to "switching...", Applicant submits column 6, lines 18-20, of the Harper '398 reference, which states "In step 460, it is determined whether the primary node has failed. If not (e.g., a 'YES' in step 460), then the process continues by looping to step 460 again" teaches away from the subject matter of claim 36, as amended. Thus, Applicant submits claim 36 is in condition for allowance.

Amendment of claim 54:

Applicant has amended claim 54 to correct a typographical error. Applicant submits the amendment is merely cosmetic and does not change the scope or meaning of claim 54. Applicant submits support for the amendment exists in claim 54 itself prior to the amendment, as well as in the originally filed application, for example, at page 30, lines 5, 8, 10, and 11. Thus, Applicant submits claim 54 is in condition for allowance.

Replies to Examiner's Responses to Arguments:

In the Examiner's Response to Arguments, the Examiner states as follows:

Applicant's arguments filed 12/10/10 have been fully considered but they are not persuasive.

Applicant has argued that the applicant has solely relied upon KSR and this rationale is newly unfounded in respect to new rulings. The examiner respectfully disagrees. The examiner cited KSR, among other case law, but the examiner has given independent rationale for combination of references in the claim rejections. The examiner did not just state the motivation is KSR solely.

While the Examiner alleges "Applicant has argued that the applicant has solely relied upon KSR and this rationale is newly unfounded in respect to new rulings," Applicant submits Applicant did not so argue. Applicant submits Applicant had argued Applicant had cited and presented arguments with respect to post-KSR case law, which the Examiner does not appear to have considered. For the Examiner to state, "The examiner cited KSR, among other case law, but the examiner has given independent rationale for combination of references in the claim rejections" suggests the Examiner is willfully failing to consider the post-KSR case law cited by Applicant, as Applicant submits whatever "independent rationale for combination of references in the claim rejections" the Examiner might assert is not proper if it cannot be shown to be consistent with relevant case law. For the Examiner to state, "The examiner did not just state the motivation is KSR solely" also does not suggest that the Examiner considered the post-KSR case law cited by Applicant. As Applicant submits the Examiner has not shown the Examiner's rejections to comport with the post-KSR case law cited by Applicant, Applicant respectfully requests the Examiner reconsider the Examiner's rejections in view of such case law.

In the Examiner's previous Response to Arguments, the Examiner states as follows:

In response to applicant's argument that there is no teaching, suggestion, or motivation to combine the references, the examiner recognizes that obviousness may be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the

knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988), *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992), and *KSR International Co. v. Teleflex, Inc.*, 550 U.S. 398, 82 USPQ2d 1385 (2007). In this case, the prior office actions address this issue with respect to the argued claims.

While the Examiner cites *KSR International Co. v. Teleflex, Inc.*, 550 U.S. 398, 82 USPQ2d 1385 (2007), Applicant notes Applicant has cited and presented arguments with respect to post-KSR case law, which the Examiner does not appear to have considered. Applicant respectfully requests consideration of Applicant's arguments.

Claim 45:

Regarding claim 45, in the Examiner's previous Response to Arguments, the Examiner states as follows:

With respect to claim 45, the applicant has stated in his Remarks, dated 7/26/10, on page 22:

In the Examiner's previous Response to Arguments, the Examiner alleges teaching "indicating 'facilitating an administrator-initiated protection switching operation in response to receiving an administrator-issued protection switching initiation' operations." However, Applicant submits claim 45 recites, in relevant part, "facilitating an administrator-initiated protection switching operation in response to receiving an administrator-issued protection switching initiation notification." Thus, Applicant submits the Examiner has not alleged teaching or suggestion as to the subject matter of claim 45. Accordingly, Applicant submits the Examiner has not made a prima facie showing of obviousness with respect to claim 45. Therefore, Applicant submits claim 45 is in condition for allowance.

The examiner does not see a difference in what the applicant says the examiner teaches and what the claim recites, and, as such, the examiner interprets this is an admission that what the applicant says the examiner is teaching, in the prior action, is the same as the claim language.

Applicant does not attribute any alleged teaching to the Examiner. Applicant has not admitted "that what the applicant says the examiner is teaching, in the prior action, is the same as the claim language." Applicant has not alleged anything to be "the same as the claim language." Applicant has amended claim 45 in response to the non-final Office action of August 20, 2010. Applicant submits claim 45 is in condition for allowance.

Claim 50:

Regarding claim 50, in the Examiner's previous Response to Arguments, the Examiner states as follows:

With respect to claim 50, the applicant has argued that Harper does not teach "downloading service information of the failure predicted one of said protected system elements to the protection system

element after identifying the failure predicted one of said protected system elements". The examiner respectfully disagrees. Harper '398 teaches, in column 2, lines 23-26, of downloading the state of the failing node to another node.

Applicant has amended claim 45, from which claim 50 depends, in response to the non-final Office action of August 20, 2010. Applicant submits claim 50 is in condition for allowance.

Claim 1:

Reply to Examiner's Response to Arguments of final Office action

Regarding claim 1, in the Examiner's Response to Arguments, the Examiner states as follows:

As per claim 1, the applicant claims the cited reference teaches away from the claim language, but does not give an explanation of how or why, in specificity, the passages teach away. Also, the applicant argues that Downes does not teach an element demerit point level of the elements. The examiner respectfully disagrees. The examiner interprets the demerit point to be equivalent to the failure prediction threshold level of Downes.

Applicant notes the Examiner cites "(see column 1 lines 60-65)" of the Downes reference in rejecting claim 1. Applicant submits the cited portion of the cited reference does not appear to recite a "failure prediction threshold level." Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 1. Therefore, Applicant submits claim 1 is in condition for allowance.

Previous Reply to Examiner's previous Response to Arguments of non-final Office action

Regarding claim 1, in the Examiner's previous Response to Arguments, the Examiner states as follows:

With respect to claim 1, the applicant argues that Downes does not teach the error logging to "each one of said protected system elements". The examiner wishes to clarify the error logging is the Downes teaching limitation and is combined the elements of Harper, not of Downes. The applicant also argues that Entenman does not teach multiple failures. The examiner respectfully disagrees. In the cited passage of Entenman (column. 6, lines 36-42, Entenman explicitly teaches "multiple failures".

Regarding claim 1, while the Examiner cites "(column 6, lines 36-42, Entenman explicitly teaches 'multiple failures,'" Applicant submits the Examiner has cited such portion with respect to "allotting a spare device among the devices in accordance with a priority algorithm." Applicant submits "(column 6, lines 36-42, Entenman" teaches away from "...based at least partially on an element demerit point level of each one of said protected system elements." Applicant submits the

Examiner has not shown the cited portions of the cited references to teach or suggest such feature. Thus, Applicant submits claim 1 is in condition for allowance.

With respect to claim 1, Applicant notes the Examiner alleges "Downes further discloses the concept of predicting a failure upon determination the error count over a selected number of operations is above a criterion or threshold (see column 1 lines 60-65), apparently to allege teaching or suggestion of "wherein identifying the failure predicted one of said protected system elements includes assessing performance of said protected system elements based at least partially on an element demerit point level of each one of said protected system elements." Applicant notes the Examiner expressly states that Harper '398 fails to explicitly disclose such feature. Applicant submits the Examiner does not appear to allege that Entenman discloses such feature. Rather, as discussed above, Applicant submits the Examiner appear to rely solely on the Downes reference to allege teaching or suggestion of, for example, "...based at least partially on an element demerit point level of each one of said protected system elements." Thus, Applicant presented argument to counter that apparent allegation. Accordingly, Applicant submits that none of the cited references relied upon by the Examiner teach or suggest, for example, "...based at least partially on an element demerit point level of each one of said protected system elements." Thus, any combination of the cited references relied upon by the Examiner, assuming arguendo such combination is properly made in accordance with U.S. patent law, fails to teach or suggest, for example, "...based at least partially on an element demerit point level of each one of said protected system elements." Applicant's argument is therefore made directly toward the combination of the references, requiring analysis of the teachings of each constituent reference of the combination individually. Therefore, Applicant submits the Examiner has not shown the combination of references to render unpatentable the subject matter of claim 1.

Claim 2:Reply to Examiner's Response to Arguments of final Office action

Regarding claim 2, in the Examiner's Response to Arguments, the Examiner states as follows:

As per claim 2, the applicant argues that the examiner has presented language that is not present in claim as being taught by the cited reference. The examiner apologizes for any confusion set forth by the examiner using shortened paraphrasing of longer claim language. If it pleases the applicant, please replace the paraphrasing, as stated by the examiner, and replace it with the claim language as the language being taught by the cited reference.

While the Examiner states the Examiner used "...shortened paraphrasing of longer claim language" and states, "...please replace the paraphrasing, as stated by the examiner, and replace it with the claim language as the language being taught by the cited reference," in apparent reference to the Examiner's assertion that "Harper explicitly teaches, in the cited passage, the monitoring of the system and the triggering of an event when a specific point is reached. While the Examiner cites "(see column 9 lines 15-20 of incorporated by reference Harper '266)," Applicant notes such portion recites "In single parameter monitoring, a rejuvenation agent monitors a small set of parameters and triggers rejuvenation when one or more of them approaches a predefined resource exhaustion threshold or characteristic hazardous value. This is effective for scenarios where a small number of primary indicators are found which reliably indicate resource exhaustion." Thus, Applicant submits the Examiner's "paraphrasing" appears to be paraphrasing of the cited portion of the cited reference, not "...shortened paraphrasing of longer claim language." As Applicant stated, Applicant submits such "monitoring" does not disclose or suggest "...identifying the failure predicted one of said protected system elements...", as Applicant sees no teaching or suggestion as to "...said protected system elements." Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 2.

Previous Reply to Examiner's previous Response to Arguments of non-final Office action

Regarding claim 2, in the Examiner's previous Response to Arguments, the Examiner states as follows:

With respect to claim 2, the applicant argues that Harper does not teach the claim language. The examiner respectfully disagrees. Harper explicitly teaches, in the cited passage, the monitoring of the system and the triggering of an event when a specific point is reached. This fulfills the claim language as claimed.

Regarding claim 2, Applicant submits claim 2 does not recite "the monitoring of the system and the triggering of an event when a specific point is reached." Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 2. Therefore, Applicant submits claim 2 is in condition for allowance.

With respect to claim 2, Applicant notes the Examiner cites only "(see column 9 lines 15-20 of incorporated reference Harper '266)" as allegedly teaching or suggesting "wherein identifying the failure predicted one of said protected system elements includes assessing at least one of a plurality of failure prediction parameters of said protected system elements for determining when a failure

prediction condition has been met by one of said protected system elements." Thus, Applicant presented argument to counter that apparent allegation. Applicant notes the Examiner does not appear to allege teaching or suggestion of such subject matter in any of the other cited references.

Accordingly, Applicant submits that none of the cited references relied upon by the Examiner teach or suggest, for example, "wherein identifying the failure predicted one of said protected system elements includes assessing at least one of a plurality of failure prediction parameters of said protected system elements for determining when a failure prediction condition has been met by one of said protected system elements." Thus, any combination of the cited references relied upon by the Examiner, assuming arguendo such combination is properly made in accordance with U.S. patent law, fails to teach or suggest, for example, "wherein identifying the failure predicted one of said protected system elements includes assessing at least one of a plurality of failure prediction parameters of said protected system elements for determining when a failure prediction condition has been met by one of said protected system elements." Applicant's argument is therefore made directly toward the combination of the references, requiring analysis of the teachings of each constituent reference of the combination individually. Therefore, Applicant submits the Examiner has not shown the combination of references to render unpatentable the subject matter of claim 2.

Claim 3:Reply to Examiner's Response to Arguments of final Office action

Regarding claim 3, in the Examiner's Response to Arguments, the Examiner states as follows:

As per claim 3, the applicant again is confused by the paraphrasing and rejection logic of the examiner. Again, if it pleases the applicant, please replace the paraphrasing, as stated by the examiner, and replace it with the claim language as the language being taught by the cited reference.

While the Examiner states the Examiner used "...the applicant again is confused by the paraphrasing and rejection logic of the examiner" and states, "...please replace the paraphrasing, as stated by the examiner, and replace it with the claim language as the language being taught by the cited reference," in apparent reference to the Examiner's assertion that "The examiner respectfully disagrees and once again refers the applicant to claim 2 argument above, wherein the state of the node has met a state where a triggering event has occurred." Applicant notes the Examiner had previously alleged, with respect to claim 2, "Harper explicitly teaches, in the cited passage, the monitoring of the system and the triggering of an event when a specific point is reached. While the Examiner cites "(see column

9 lines 15-20 of incorporated by reference Harper '266)," Applicant notes such portion recites "In single parameter monitoring, a rejuvenation agent monitors a small set of parameters and triggers rejuvenation when one or more of them approaches a predefined resource exhaustion threshold or characteristic hazardous value. This is effective for scenarios where a small number of primary indicators are found which reliably indicate resource exhaustion." Thus, Applicant submits the Examiner's "paraphrasing" appears to be paraphrasing of the cited portion of the cited reference, not "...shortened paraphrasing of longer claim language." As Applicant stated, Applicant submits the cited portion of the cited reference fails to disclose or suggest "...determining whether the failure prediction parameter has met a failure prediction condition," as Applicant sees no teaching or suggestion as to "...failure prediction condition" or even "...has met...." Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 3.

Previous Reply to Examiner's previous Response to Arguments of non-final Office action

Regarding claim 3, in the Examiner's previous Response to Arguments, the Examiner states as follows:

With respect to claim 3, the applicant has argued that Harper does not teach correlating a present state of the failure prediction parameter to a prediction condition. The examiner respectfully disagrees and once again refers the applicant to claim 2 argument above, wherein the state of the node has met a state where a triggering event has occurred.

Regarding claim 3, Applicant submits claim 3 does not recite what the Examiner alleged with respect to claim 2 above. Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 3. Therefore, Applicant submits claim 3 is in condition for allowance.

With respect to claim 3, Applicant notes the Examiner cites only "(see column 9 lines 15-20 of incorporated reference Harper '266)" as allegedly teaching or suggesting "monitoring a failure prediction parameter of at least one of the plurality of protected system elements" and also cites only the same portion of the same reference as allegedly teaching or suggesting "correlating a present state of the failure prediction parameter to a failure prediction criterion for determining whether the failure prediction parameter has met a failure prediction condition.." Thus, Applicant presented argument to counter those apparent allegations. Applicant notes the Examiner does not appear to allege teaching or suggestion of such subject matter in any of the other cited references. Accordingly, Applicant submits that none of the cited references relied upon by the Examiner teach or suggest either of the cited

portions of the subject matter of claim 3. Thus, any combination of the cited references relied upon by the Examiner, assuming *arguendo* such combination is properly made in accordance with U.S. patent law, fails to teach or suggest either of cited portions of the subject matter of claim 3. Applicant's argument is therefore made directly toward the combination of the references, requiring analysis of the teachings of each constituent reference of the combination individually. Therefore, Applicant submits the Examiner has not shown the combination of references to render unpatentable the subject matter of claim 3.

Claim 5:Reply to Examiner's Response to Arguments of final Office action

Regarding claim 5, in the Examiner's Response to Arguments, the Examiner states as follows:

As per claim 5, the applicant claims the cited reference teaches away from the claim language, but does not give an explanation of how or why, in specificity, the passages teach away; furthermore, the argued "teaches away" part is language in the preamble carried over from claim 3, not 5. Also, please look at the previous Office Action as to determine which limitations are cited as being taught by the respective reference.

Applicant notes claim 5 depends from claim 3. Thus, Applicant submits any "teaching away" with respect to subject matter in claim 3 also "teaches away" from claim 5 as a whole. Therefore, Applicant submits the Examiner's attempted distinction of "...the argued 'teaches away' part is language in the preamble carried over from claim 3, not 5" is moot. Accordingly, Applicant submits claim 5 is in condition for allowance.

Previous Reply to Examiner's previous Response to Arguments of non-final Office action

Regarding claim 5, in the Examiner's previous Response to Arguments, the Examiner states as follows:

With respect to claim 5, the applicant argues that claim is not met by Harper. The examiner wishes to clarify that the monitoring aspect of the claim is met by Harper '266 and the bridging by Harper '398, as cited.

Regarding claim 5, Applicant submits "...dynamic system updates..." teaches away from "...the monitoring the failure prediction parameter further comprising..." Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 5. Therefore, Applicant submits claim 5 is in condition for allowance.

Claim 10:Reply to Examiner's Response to Arguments of final Office action

Regarding claim 10, in the Examiner's Response to Arguments, the Examiner states as follows:

With respect to claim 10, claim 1 stands rejected, so claim 10 falls rejected as well.

Applicant submits claim 10 adds additional subject matter not present in claim 1. Thus, Applicant submits alleging a rejection of claim 1 is insufficient to allege a rejection of claim 10. Therefore, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 10. Accordingly, Applicant submits claim 10 is in condition for allowance.

Claim 12:Reply to Examiner's Response to Arguments of final Office action

Regarding claim 12, in the Examiner's Response to Arguments, the Examiner states as follows:

As per claim 12, the applicant stated the examiner has failed to establish an inherency of the cited reference. The examiner repeats, from the previous Office Action, that the reference "implicitly teaches", not inherently.

Applicant respectfully requests the Examiner explain how the reference supposedly "...'implicitly teaches,' but not inherently." Applicant notes Footnote 14 of *Standard Havens Products, Inc. v. Gencor Industries, Inc.*, 953 F.2d 1360, 21 U.S.P.Q.2d 1321 (Fed. Cir. 1991), cites language as to "inherency" (without any mention of "implicit") from *Tyler Refrigeration v. Kysor Indus. Corp.*, 777 F.2d 687, 689, 227 USPQ 845, 846-47 (Fed.Cir.1985) as to "...when a claimed limitation is 'inherent' or otherwise implicit in the relevant reference" [emphasis added]. Applicant submits the Federal Circuit's apparent characterization of its own previous opinion regarding "inherency" (but not mentioning "implicit") as applying to "'inherent' or otherwise implicit" indicates that case law relating to establishing inherent disclosure also applies to establishing implicit disclosure. Applicant submits the Examiner has not shown inherent disclosure/implicit disclosure to exist in accordance with the case law Applicant previously cited. Thus, Applicant submits claim 12 is in condition for allowance. Nonetheless, Applicant respectfully requests the Examiner to explain what the Examiner considers to be the difference between "implicitly teaches" and "inherently [teaches]" and to provide citations to whatever legal authority the Examiner may rely upon to establish such supposed difference.

Previous Reply to Examiner's previous Response to Arguments of non-final Office action

Regarding claim 12, in the Examiner's previous Response to Arguments, the Examiner states as follows:

With respect to claim 12, the applicant has argued that Downes does not teach a designated period of time. The examiner respectfully disagrees. Downes, at least, implicitly teaches a period to perform the operations, otherwise, infinity would be included.

Regarding claim 12, Applicant submits the Examiner appears to be asserting a rejection based on inherency. Applicant submits that the teachings of the cited reference fail to establish inherency in accordance with existing law. For example, Applicant submits that the Examiner has failed to establish that the public gained the benefit of the claimed subject matter from the teachings of the cited reference. *Schering Corp. v. Geneva Pharmaceuticals*, 339 F.3d 1373 (Fed. Cir. 2003). As another example, Applicant submits that the Examiner has failed to establish that the claimed subject matter is present in the teachings of the cited reference. *Mentor v. Medical Device Alliance*, 244 F.3d 1365 (Fed. Cir. 2001); *Scaltech v. Retec/Tetra*, 178 F.3d 1378 (Fed. Cir. 1999). Thus, Applicant submits that the claimed subject matter cannot be considered to be inherent in the teachings of the cited reference. Accordingly, Applicant submits the Examiner has failed to satisfy the burden of proof required for asserting a rejection based on inherency. Therefore, Applicant submits that the Examiner has not shown the claimed subject matter to be unpatentable in view of the cited references.

Claim 13:Reply to Examiner's Response to Arguments of final Office action

Regarding claim 13, in the Examiner's Response to Arguments, the Examiner states as follows:

As per claim 13, the applicant argues that the examiner has not taught how "integrating error counts over a selected number" teaches determining a rate of change of element demerit points has exceeded a threshold limit. The examiner interprets the "counts" to be inherent of the process of counting, and "over a selected number" to be interpreted as over a threshold.

While the Examiner states, "The examiner interprets the 'counts'" to be inherent of the process of counting, and 'over a selected number' to be interpreted as over a threshold," Applicant notes claim 13 does not recite "counting." Moreover, Applicant submits the Examiner appears to be alleging inherency. Applicant submits that the teachings of the cited reference fail to establish inherency in accordance with existing law. For example, Applicant submits that the Examiner has failed to

establish that the public gained the benefit of the claimed subject matter from the teachings of the cited reference. *Schering Corp. v. Geneva Pharmaceuticals*, 339 F.3d 1373 (Fed. Cir. 2003). As another example, Applicant submits that the Examiner has failed to establish that the claimed subject matter is present in the teachings of the cited reference. *Mentor v. Medical Device Alliance*, 244 F.3d 1365 (Fed. Cir. 2001); *Scaltech v. Retec/Tetra*, 178 F.3d 1378 (Fed. Cir. 1999). Thus, Applicant submits that the claimed subject matter cannot be considered to be inherent in the teachings of the cited reference. Accordingly, Applicant submits the Examiner has failed to satisfy the burden of proof required for asserting a rejection based on inherency. Therefore, Applicant submits that the Examiner has not shown the claimed subject matter to be unpatentable in view of the cited references.

Moreover, Applicant submits the Examiner does not explain how "...counts..." teaches "...determining that a rate of change of element demerit points..." even as Applicant has previously submitted the Examiner mischaracterizes the Downes references as allegedly teaching "a change in the number of error counts," a mischaracterization with which Applicant submits the Examiner persists. Applicant submits such a mischaracterization does not relieve the Examiner of explaining how "...counts..." teaches "...determining that a rate of change of element demerit points..." Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 13. Therefore, Applicant submits claim 13 is in condition for allowance.

Previous Reply to Examiner's previous Response to Arguments of non-final Office action

Regarding claim 13, in the Examiner's previous Response to Arguments, the Examiner states as follows:

With respect to claim 13, the applicant has argued that Downes does not teach a rate of change. The examiner respectfully disagrees. Downes teaches a change in the number of error counts, and this count change is deemed as a rate of change.

Regarding claim 13, Applicant submits the cited portion of the Downes reference does not teach "a change in the number of error counts," as alleged by the Examiner. Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 13. Therefore, Applicant submits claim 13 is in condition for allowance.

Moreover, Applicant notes the Examiner had previously alleged, "Downes discloses error logging by integrating error counts over a selected number of operations (see column 1 lines 60-65), indicating the claim limitation." However, Applicant submits the Examiner does not explain how

"...integrating..." teaches "...determining that a rate of change of element demerit points...."

Applicant submits the Examiner now mischaracterizes the Downes references as allegedly teaching "a change in the number of error counts." Applicant submits such a mischaracterization does not relieve the Examiner of explaining how "...integrating..." teaches "...determining that a rate of change of element demerit points...." Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 13. Therefore, Applicant submits claim 13 is in condition for allowance.

Claim 15:

Reply to Examiner's Response to Arguments of final Office action

Regarding claim 15, in the Examiner's Response to Arguments, the Examiner states as follows:

As per claim 15, the applicant again is confused by the paraphrasing and rejection logic of the examiner. Again, if it pleases the applicant, please replace the paraphrasing, as stated by the examiner, and replace it with the claim language as the language being taught by the cited reference.

While the Examiner states the Examiner used "...the applicant again is confused by the paraphrasing and rejection logic of the examiner" and states, "...please replace the paraphrasing, as stated by the examiner, and replace it with the claim language as the language being taught by the cited reference," in apparent reference to the Examiner's assertion that "Entenman teaches allotting a spare among multiple modules with a failure therein." Applicant submits the cited portion of the cited reference discloses neither "...with a failure therein," as alleged by the Examiner, nor the claim language with which the Examiner apparently invites Applicant to replace it. As an example, Applicant submits the cited portion of the cited reference fails to disclose "...a collection of failure predicted system elements...." As another example, Applicant submits the cited portion of the cited reference fails to disclose "...the failure predicted one of said protected system elements...." Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 15. Therefore, Applicant submits claim 15 is in condition for allowance.

Previous Reply to Examiner's previous Response to Arguments of non-final Office action

Regarding claim 15, in the Examiner's previous Response to Arguments, the Examiner states as follows:

With respect to claim 15, the applicant argues that Entenman does not teach the claim language. The examiner respectfully disagrees. Entenman teaches allotting a spare among multiple modules with a failure therein.

Regarding claim 15, Applicant submits claim 15 does not recite "allotting a spare among multiple modules with a failure therein." Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 15. Therefore, Applicant submits claim 15 is in condition for allowance.

Claim 16:

Reply to Examiner's Response to Arguments of final Office action

Regarding claims 16 and 17, in the Examiner's Response to Arguments, the Examiner states as follows:

As per claim 16 and 17, the applicant again is confused by the paraphrasing and rejection logic of the examiner. Again, if it pleases the applicant, please replace the paraphrasing, as stated by the examiner, and replace it with the claim language as the language being taught by the cited reference. The same rationale for rejection of claim 15 holds for claims 16-17.

While the Examiner states the Examiner used "...the applicant again is confused by the paraphrasing and rejection logic of the examiner" and states, "...please replace the paraphrasing, as stated by the examiner, and replace it with the claim language as the language being taught by the cited reference," Applicant submits the Examiner does not appear to have engaged in "paraphrasing" with respect to claims 16 and 17 but rather appears to have merely directed "the applicant to claim 15 argument above as [allegedly] applicable to" claims 16 and 17. As Applicant submits claims 16 and 17 depend from claim 15 and recite additional subject matter not recited in claim 15, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claims 16 and 17. Therefore, Applicant submits claims 16 and 17 are in condition for allowance.

Previous Reply to Examiner's previous Response to Arguments of non-final Office action

Regarding claims 16 and 17, in the Examiner's previous Response to Arguments, the Examiner states as follows:

With respect to claims 16 and 17, the applicant has argued the claim language. The examiner respectfully disagrees and directs the applicant to claim 15 argument above as applicable to this claim.

Regarding claims 16 and 17, Applicant submits claims 16 and 17 do not recite what the Examiner alleged with respect to claim 15. Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claims 16 and 17. Therefore, Applicant submits claims 16 and 17 are in condition for allowance.

Claim 18:

Reply to Examiner's Response to Arguments of final Office action

Regarding claim 18, in the Examiner's Response to Arguments, the Examiner states as follows:

As per claim 18, the examiner reiterates that the claim is in alternative language and Downes, at the least, teaches the threshold limitation.

While the Examiner states, "...the examiner reiterates that the claim is in alternative language and Downes, at the least, teaches the threshold limitation...", Applicant notes the Examiner cites, in rejecting claim 18, "(see column 1 lines 60-65)" of the Downes reference. Applicant notes the paragraph in which such portion is located concludes by stating "However, the prior art does not provide apparatus and/or techniques for predicting failure in a communications network by analyzing error counts in messages generated and supplied to a central station from stations in the network." Thus, Applicant submits the cited reference teaches away from the alleged teachings of the prior art in the portion of the cited reference cited by the Examiner. Thus, Applicant submits claim 18 is in condition for allowance.

Previous Reply to Examiner's previous Response to Arguments of non-final Office action

Regarding claim 18, in the Examiner's previous Response to Arguments, the Examiner states as follows:

With respect to claim 18, the applicant argues the claim language, but the examiner directs the applicant to the alternate language of the claim, which Downes does teach.

Regarding claim 18, Applicant submits column 2, lines 6-9, of the Downes et al. reference recites, "Stations in the communications network prepare and transmit to a facility called Ring Error Monitor (REM) error counts representative of errors occurring in the error domain." Thus, Applicant submits the "error counts" of the Downes et al. reference do not teach or suggest "at least one of a parameter relating to element demerit points, a parameter relating to a rate of change of said element demerit points, a parameter relating to an element demerit point threshold limit, a parameter relating to a number of active connections, a parameter relating to a number of active service subscribers, a parameter designated in a service agreement, a mounted position in a network element, an administrator-assigned priority value, a data bit rate and a rate of change of the data bit rate." Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 18. Therefore, Applicant submits claim 18 is in condition for allowance.

Claim 19:Reply to Examiner's Response to Arguments of final Office action

Regarding claim 19, in the Examiner's Response to Arguments, the Examiner states as follows:

As for claim 19, the applicant argues that the rejection set forth as being the same rejection rationale as claim 50 is not proper. The examiner contends that the body of claim 19 is verbatim the same as claim 50.

Applicant submits claims 19 and 50 are dependent claims depending from different independent claims reciting different subject matter. Thus, Applicant submits claim 19, as a whole, and claim 50, as a whole, recite different subject matter. As Applicant noted, claim 50 is subject to a different basis of rejection than claim 19. Thus, Applicant submits claim 19 is in condition for allowance.

Previous Reply to Examiner's previous Response to Arguments of non-final Office action

Regarding claim 19, in the Examiner's previous Response to Arguments, the Examiner states as follows:

With respect to claim 19, the examiner directs the applicant to the claim 50 argument above as applicable to this claim.

Regarding claim 19, Applicant submits claim 50 is subject to a different basis of rejection than claim 19. Thus, Applicant submits "the claim 50 argument" is not applicable to claim 19. Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 19. Therefore, Applicant submits claim 19 is in condition for allowance.

Claim 23:Reply to Examiner's Response to Arguments of final Office action

Regarding claim 23, in the Examiner's Response to Arguments, the Examiner states as follows:

As per claim 23, the applicant again is confused by the paraphrasing and rejection logic of the examiner. Again, if it pleases the applicant, please replace the paraphrasing, as stated by the examiner, and replace it with the claim language as the language being taught by the cited reference.

While the Examiner states the Examiner used "...the applicant again is confused by the paraphrasing and rejection logic of the examiner" and states, "...please replace the paraphrasing, as stated by the examiner, and replace it with the claim language as the language being taught by the cited reference," in apparent reference to the Examiner's assertion that "Harper teaches a one-to-many embodiment with protection to this configuration." Applicant submits Applicant does not have duty to rewrite the Examiner's rejections. Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 23. Therefore, Applicant submits claim 23 is in condition for allowance.

Previous Reply to Examiner's previous Response to Arguments of non-final Office action

Regarding claim 23, in the Examiner's previous Response to Arguments, the Examiner states as follows:

With respect to claim 23, the applicant has argued that Harper does not teach the claim language. The examiner respectfully disagrees. Harper teaches a one-to-many embodiment with protection to this configuration.

Regarding claim 23, Applicant submits claim 23 does not recite "a one-to-many embodiment with protection to this configuration." Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 23. Therefore, Applicant submits claim 23 is in condition for allowance.

Claims 24-26:

Reply to Examiner's Response to Arguments of final Office action

Regarding claims 24-26, in the Examiner's Response to Arguments, the Examiner states as follows:

As per claims 24-26, the applicant argues that the examiner did not address the claims in the prior Office Action. The stated claims are included in the section 7 with subject matter relating to nonanalogous art.

Applicant notes section 7 of the non-final Office action was prefaced with "With respect to claim 11, 39:" but does not include any reference to claims 24-26. Thus, Applicant submits the Examiner had not heretofore indicated any applicability of section 7 of the non-final Office action to claims 24-26. While the Examiner states, "In this case, the invention of Smith is combinable with reciprocating desires of failure management of a computer system," Applicant notes the Smith reference is not directed to "failure management of a computer system" generally, but rather specifically to "Adaptive Event-Based Predictive Failure Analysis Measurements in a Hard Disk Drive." While the Examiner acknowledges, "However, Harper '398 in view of Entenman and Downes fails to explicitly disclose: said switching communication service is initiated in response to the failure prediction parameter exceeding a failure prediction parameter second threshold limit different than the failure prediction parameter first threshold limit," Applicant submits the Examiner does not allege the Smith reference discloses "said switching communication service is initiated in response to the failure prediction parameter exceeding a failure prediction parameter second threshold limit different than the failure prediction parameter first threshold limit." Rather, Applicant notes the Examiner merely alleges "Smith discloses a system wherein a first threshold triggers a predictive failure analysis and a second threshold greater than the first threshold signifies a failure (see column 6 lines 6-20)." Thus, Applicant submits the combined alleged teachings of the cited references still fail to teach or suggest "said switching communication service is initiated in response to the failure prediction parameter exceeding a failure prediction parameter second threshold limit different than the failure prediction

parameter first threshold limit." Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claims 24-26.

Previous Reply to Examiner's previous Response to Arguments of non-final Office action

Regarding claims 24-26, Applicant submitted arguments with respect to such claims, but Applicant does not see any response in the Examiner's previous Response to Arguments. Accordingly, Applicant respectfully requests the Examiner consider Applicant's arguments. Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claims 24-26. Therefore, Applicant submits claims 24-26 are in condition for allowance.

Claim 27:

Reply to Examiner's Response to Arguments of final Office action

Regarding claim 27, in the Examiner's Response to Arguments, the Examiner states as follows:

As per claim 27, the applicant as argued that examiner did not address the claim as it is distinct from claim 2, as directed to in the previous Office Action. A copy of claim 2 rejection is attached for specificity: the applicant argues that Harper does not teach the claim language. The examiner respectfully disagrees. Harper explicitly teaches, in the cited passage, the monitoring of the system and the triggering of an event when a specific point is reached. This fulfills the claim language as claimed.

Applicant submits claim 2 does not recite "...has exceeded a failure prediction parameter first threshold limit." Applicant submits claim 27 does not recite "...the monitoring of the system and triggering of an event when a specific point is reached," as allegedly by the Examiner. Moreover, Applicant submits "...the monitoring of the system and triggering of an event when a specific point is reached," as alleged by the Examiner, does not disclose the subject matter of claim 27. Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 27. Therefore, Applicant submits claim 27 is in condition for allowance.

Previous Reply to Examiner's previous Response to Arguments of non-final Office action

Regarding claim 27, in the Examiner's previous Response to Arguments, the Examiner states, "With respect to claim 27, the examiner directs the applicant to claim 2 above for the applicable argument."

Regarding claim 27, Applicant submits claim 27 is distinct from claim 2. Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 27. Therefore, Applicant submits claim 27 is in condition for allowance.

Claim 29:Reply to Examiner's Response to Arguments of final Office action

Regarding claim 29, in the Examiner's Response to Arguments, the Examiner states as follows:

As per claim 29, the applicant as argued that examiner did not address the claim as it is distinct from claim 23, as directed to in the previous Office Action. A copy of claim 2 rejection is attached for specificity: the applicant has argued that Harper does not teach the claim language. The examiner respectfully disagrees. Harper teaches a one-to-many embodiment with protection to this configuration.

Applicant submits claim 29 is a dependent claim depending from claim 1 and claim 23 is a dependent claim depending from claim 19, which depends from claim 1. Thus, Applicant submits claim 29, as a whole, and claim 23, as a whole, recite different subject matter. Thus, Applicant submits claim 29 is in condition for allowance.

Previous Reply to Examiner's previous Response to Arguments of non-final Office action

Regarding claim 29, in the Examiner's previous Response to Arguments, the Examiner states, "With respect to claim 29, the examiner directs the applicant to claim 23 above."

Regarding claim 29, Applicant submits claim 29 is distinct from claim 23. Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 29. Therefore, Applicant submits claim 29 is in condition for allowance.

Claim 30:Reply to Examiner's Response to Arguments of final Office action

Regarding claim 30, in the Examiner's Response to Arguments, the Examiner states as follows:

With respect to claim 30, claim 1 stands rejected, so claim 30 falls rejected as well.

Applicant submits claim 30 adds additional subject matter not present in claim 1. Thus, Applicant submits alleging a rejection of claim 1 is insufficient to allege a rejection of claim 30.

Therefore, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 30. Accordingly, Applicant submits claim 30 is in condition for allowance.

Claim 35:

Reply to Examiner's Response to Arguments of final Office action

Regarding claim 35, in the Examiner's Response to Arguments, the Examiner states as follows:

As per claim 35, the applicant as argued that examiner did not address the claim as it is distinct from claim 45 as directed to in the previous Office Action. A copy of claim 45 rejection [sic] is attached for specificity: the applicant has stated in his Remarks, dated 7/26/10, on page 22:

In the Examiner's Response to Arguments, the Examiner alleges teaching "indicating 'facilitating an administrator-initiated protection switching operation in response to receiving an administrator-issued protection switching initiation' operations.'" However, Applicant submits claim 45 recites, in relevant part, "facilitating an administrator-initiated protection switching operation in response to receiving an administrator-issued protection switching initiation notification." Thus, Applicant submits the Examiner has not alleged teaching or suggestion as to the subject matter of claim 45. Accordingly, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 45. Therefore, Applicant submits claim 45 is in condition for allowance.

The examiner does not see a difference in what the applicant says the examiner teaches and what the claim recites, and, as such, the examiner interprets this is an admission that what the applicant says the examiner is teaching, in the prior action, is the same as the claim language.

Applicant notes Applicant amended claim 45 in response to the non-final Office action of August 20, 2010 to recite, in relevant part, "facilitating an administrator-initiated protection switching operation in response to receiving, at a system administrator user interface of a protected system comprising the plurality of protected system elements, an administrator-issued protection switching initiation notification." Applicant notes claim 35 recites, "...wherein identifying the failure predicted one of said protected system elements includes assessing a protection switching operation initiation notification issued via a system administrator user interface." Applicant respectfully disagrees with the supposed admission alleged by the Examiner. Applicant submits the Examiner has not alleged any teaching with respect to, for example, "assessing..." Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 35. Therefore, Applicant submits claim 35 is in condition for allowance.

Previous Reply to Examiner's previous Response to Arguments of non-final Office action

Regarding claim 35, in the Examiner's previous Response to Arguments, the Examiner states, "With respect to claim 35, the examiner directs the applicant to claim 45 above."

Regarding claim 35, Applicant submits claim 35 is distinct from claim 45. Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 35. Therefore, Applicant submits claim 35 is in condition for allowance.

Claim 36:Reply to Examiner's Response to Arguments of final Office action

Regarding claim 36, in the Examiner's Response to Arguments, the Examiner states as follows:

As per claim 36, the applicant as argued that examiner did not address the claim as it is distinct from claim 50 as directed to in the previous Office Action. A copy of claim 45 rejection is attached for specificity: the applicant has argued that Harper does not teach "downloading service information of the failure predicted one of said protected system elements to the protection system element after identifying the failure predicted one of said protected system elements". The examiner respectfully disagrees. Harper '398 teaches, in column 2, lines 23-26, of downloading the state of the failing node to another node.

Applicant submits "...commanded to begin mirroring its dynamic state updates to the secondary nodes 301B as they occur..." fails to disclose "downloading service information of the failure predicted one of said protected system elements to the protection system element...." Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 36.

Previous Reply to Examiner's previous Response to Arguments of non-final Office action

Regarding claim 36, in the Examiner's previous Response to Arguments, the Examiner states, "With respect to claim 36, the examiner directs the applicant to claim 50 above."

Regarding claim 36, Applicant submits claim 36 is distinct from claim 50. Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 36. Therefore, Applicant submits claim 36 is in condition for allowance.

Claim 11:

Previous Reply to Examiner's previous Response to Arguments of non-final Office action

Claim 28:

Reply to Examiner's Response to Arguments of final Office action

Regarding claim 28, in the Examiner's Response to Arguments, the Examiner states as follows:

As per claim 28, see KSR argument above.

While the Examiner alleges, in the "KSR argument above," "Applicant has argued that the applicant has solely relied upon KSR and this rationale is newly unfounded in respect to new rulings," Applicant submits Applicant did not so argue. Applicant submits Applicant had argued Applicant had cited and presented arguments with respect to post-KSR case law, which the Examiner does not appear to have considered. For the Examiner to state, "The examiner cited KSR, among other case law, but the examiner has given independent rationale for combination of references in the claim rejections" suggests the Examiner is willfully failing to consider the post-KSR case law cited by Applicant, as Applicant submits whatever "independent rationale for combination of references in the claim rejections" the Examiner might assert is not proper if it cannot be shown to be consistent with relevant case law. For the Examiner to state, "The examiner did not just state the motivation is KSR solely" also does not suggest that the Examiner considered the post-KSR case law cited by Applicant. As Applicant submits the Examiner has not shown the Examiner's rejections to comport with the post-KSR case law cited by Applicant, Applicant respectfully requests the Examiner reconsider the Examiner's rejections in view of such case law.

Previous Reply to Examiner's previous Response to Arguments of non-final Office action

Regarding claim 28, Applicant has submitted argument in view of *KSR* and post-*KSR* case law, which the Examiner has not addressed. Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 28. Therefore, Applicant submits claim 28 is in condition for allowance.

Claim 53:Reply to Examiner's Response to Arguments of final Office action

Regarding claim 53, in the Examiner's Response to Arguments, the Examiner states as follows:

As per claim 53, the applicant claims the cited reference teaches away from the claim language, but does not give an explanation of how or why, in specificity, the passages teach away.

Applicant notes the Smith reference is not directed to "...signifying a system element has failed...and having a second threshold that signifies a failure..." generally, but rather specifically to "Adaptive Event-Based Predictive Failure Analysis Measurements in a Hard Disk Drive." Applicant submits the Examiner has not shown the teachings of the Smith reference to be applicable to the subject matter of claims 53 (including the subject matter of base claim 45). Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 53.

Previous Reply to Examiner's previous Response to Arguments of non-final Office action

Regarding claim 53, in the Examiner's previous Response to Arguments, the Examiner states, "With respect to claim 53, the examiner contends that Smith teaches two thresholds and therefore meets the limitation."

Regarding claim 53, Applicant has submitted argument of "teaching away," which the Examiner has not addressed. Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 53. Therefore, Applicant submits claim 53 is in condition for allowance.

Claim 54:Reply to Examiner's Response to Arguments of final Office action

Regarding claim 54, in the Examiner's Response to Arguments, the Examiner states as follows:

As per claim 54, the applicant argues that the claim language is distinct from the referred claim language of claims 1 and 13. The examiner requests the applicant to specifically point out what is distinct to claim 54 over claims 1 and 13.

Applicant notes claim 54 is an apparatus claim reciting apparatus elements, while claims 1 and 13 are method claims. Thus, Applicant submits claim 54 is distinct from claims 1 and 13. Thus,

Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 54. Therefore, Applicant submits claim 54 is in condition for allowance.

Previous Reply to Examiner's previous Response to Arguments of non-final Office action

Regarding claim 54, in the Examiner's previous Response to Arguments, the Examiner states, "With respect to claim 54, the examiner directs the applicant to claims 1 and 13 above."

Regarding claim 54, Applicant submits claim 54 is distinct from claims 1 and 13. Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 54. Therefore, Applicant submits claim 54 is in condition for allowance.

Rejection of claims 45 and 50 under 35 U.S.C. § 103(a):

The Examiner has rejected claims 45 and 50 under 35 U.S.C. § 103(a) as allegedly being unpatentable over US Patent No. 6,978,398 of Harper et al. referred to hereinafter as "Harper '398" in view of US Patent No. 4,245,342 of Entenman. Applicant respectfully disagrees.

The Examiner notes that Harper '398 (see column 1 lines 8-12) incorporates by reference US Patent No. 6, 629,266 of Harper et al. referred to hereinafter as "Harper '266", which is introduced in the rejection below.

Claim 45:

Reply to Examiner's Response to Arguments of final Office action

Regarding claim 45, the Examiner states as follows:

In regards to claim 45, Harper '398 discloses a method of facilitating protection switching comprising:

facilitating a protection switching configuration operation wherein a failure prediction condition for at least a portion of a plurality of protected system elements is defined (see column 2 lines 23-26);

facilitating a failure confirmed protection switching operation in response to identifying that the failure prediction condition for one of said protected has been met during operation of said protected system elements (see column 6 lines 18-25);

facilitating an administrator-initiated protection switching operation in response to receiving, at a system administrator user interface (figure 18 or Harper '266) of a protected system comprising the plurality of protected system elements, an administrator-issued protection switching initiation notification (see column 4 lines 20-27 of incorporated by reference Harper '266).

However, Harper '398 fails to explicitly disclose:

specifying a protection switching priority for at least a portion of said protected system elements;

determining that the protection switching priority among a collection of failure predicted system elements applies to the one of said protected system elements prior to facilitating the failure confirmed protection switching operation.

Entenman further discloses in case of multiple failures, allotting a spare device among the devices in accordance with a priority algorithm (see column 6 lines 38-42); and determining that the protection switching priority among a collection of failure predicted system elements applies to the one of said protected system elements prior to facilitating the failure confirmed protection switching operation (column 6, lines 38-42).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to combine the teachings of Harper and Entenman [*sic*] to allot a spare device among the devices in accordance with a priority algorithm, thus indicating specifying a protection switching priority for at least a portion of said protected system elements. A person of ordinary skill in the art could have been motivated to combine the teachings because Harper is concerned with failing over nodes for preventing degradation of performance (see figure 5b; column 1 lines 62-65, column 2 lines 23-26, and column 6 lines 39-42), and allotting a spare device among the devices in accordance with a priority algorithm, as per teachings of Entenman (see column 6 lines 38-42), constitutes as suitable known means for failing over nodes.

Regarding claim 45, Applicant has amended claim 45 in response to the non-final Office action of August 20, 2010. Applicant submits no new matter has been added. Applicant submits support for the amendment can be found in the specification as originally filed, for example, in FIG. 1 and paragraphs [0018] and [0019]. Thus, Applicant submits claim 45 is in condition for allowance.

Applicant reiterates Applicant's previously presented arguments below:

With respect to claim 45, the Examiner alleges "A person of ordinary skill in the art could have been motivated to combine the teachings because Harper is concerned with failing over nodes for preventing degradation of performance (see figure 5b; column 1 lines 62-65, column 2 lines 23-26, and column 6 lines 39-42), and allotting a spare device among the devices in accordance with a priority algorithm, as per teachings of Entenman (see column 6 lines 38-42), constitutes as suitable known means for failing over nodes." While the Examiner alleges various teachings with respect to different references, even assuming *arguendo* the merit of the Examiner's allegations, Applicant submits "a patent composed of several elements is not proved obvious merely by demonstrating that each of its elements is, independently, known in the prior art." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 405, 418 (2007). While the Examiner relies on alleged teachings of the Entenman '342 and Harper et al. '398 references, Applicant notes such references are classified in different U.S. classifications and appear to have been subjected to mutually exclusive fields of search. Thus, Applicant submits one of

ordinary skill in the art would not have been led to attempt to combine the alleged teachings. Applicant submits the Examiner has not provided a plausible rationale as to why the prior art references would have worked together to render the claims obvious. *Power-One, Inc. v. Artesyn Techs., Inc.*, 599 F.3d 1343 (Fed. Cir. 2010). As an example, Applicant submits the Examiner has not cited any portion of any of the cited references with respect to the Examiner's allegation of "...constitutes as suitable known means for failing over nodes." Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 45.

Regarding claim 45, Applicant submits the cited portions of the cited references fail to render unpatentable the subject matter of claim 45. As an example, Applicant submits the cited portions of the cited references fail to render obvious "facilitating a failure confirmed protection switching operation in response to identifying that the failure prediction condition for one of said protected has been met during operation of said protected system elements." While the Examiner cites "(see column 6 lines 18-25)" of the Harper et al. '398 reference, Applicant notes the Examiner cited "(see column 2 lines 23-26)" with respect to "...wherein a failure prediction condition for at least a portion of a plurality of protected system elements is defined," and Applicant submits the teachings of column 6, lines 18-25, do not disclose or render obvious, for example, "...in response to identifying that the failure prediction condition for one of said protected has been met during operation of said protected system elements." Also, while the Examiner cites "(see column 4 lines 20-22 of incorporated by reference Harper '266)" as allegedly disclosing "facilitating an administrator-initiated protection switching operation in response to receiving an administrator-issued protection switching initiation notification," Applicant submits no teaching as to, for example, "...in response to receiving an administrator-issued protection switching initiation notification" is found in the cited portion. Thus, Applicant submits the Examiner's alleged motivation to combine is flawed. Therefore, Applicant submits claim 45 is in condition for allowance.

Claim 50:

Reply to Examiner's Response to Arguments of final Office action

Regarding claim 50, the Examiner states as follows:

In regards to claims 50, Harper '398 in view of Entenman discloses the claim limitations as discussed above. Harper '398 further discloses:

downloading service information of the failure predicted one of said protected system elements to the protection system element after identifying the failure predicted one of said protected system elements (see column 2 lines 23-26);

confirming failure of the first failure predicted one of said protected system elements (see column (see column 6 lines 20-25); and

switching communication service supported by the failure predicted one of said protected system elements for being supported by to the protection system element after confirming said failure (see column 6 lines 20-25).

Regarding claim 50, Applicant submits the cited portions fail to disclose or render obvious the subject matter of claim 50. As an example, while the Examiner cites "(see column 2 lines 23-26)" as allegedly disclosing "downloading service information of the failure predicted one of said protected system elements to the protection system element after identifying the failure predicted one of said protected system elements," Applicant submits "...wherein there is other than a one-to-one relationship between the another node and the primary node" does not teach or suggest "downloading service information of the failure predicted one of said protected system elements to the protection system element...." Therefore, Applicant submits claim 50 is in condition for allowance.

Rejection of claims 1-3, 5, 10, 12-13, 15-19, 23, 27, 29-30, 35, and 36 under 35 U.S.C. § 103(a):

The Examiner has rejected claims 1-3, 5, 10, 12-13, 15-19, 23, 27, 29-30, 35, and 36 under 35 U.S.C. § 103(a) as allegedly being unpatentable over U.S. Patent No. 6,978,398 (Harper '398 (which incorporates by reference Harper '266)) in view of U.S. Patent No. 4,245,342 of Entenman and US Patent No. 4,769,761 of Downes et al. referred to hereinafter as "Downes".

Claim 1:

Regarding claim 1, the Examiner states as follows:

In regards to claim 1, Harper '398 discloses a method of facilitating protection switching to enhance performance of a network system, comprising:

identifying a failure predicted one (see column 2 lines 19-23) of a plurality of protected system elements (see column 4 lines 23-27); and

implementing a protection switching operation for switching designated information from the failure predicted one of said protected system elements to a protection system element (see column 2 lines 23-26).

However, Harper '398 fails to explicitly disclose:

wherein identifying the failure predicted on of said protected system elements includes assessing performance of said protected system elements based at least partially on an element demerit point level of each one of said protected system elements

and at least partially on a protection switching priority for at least a portion of said protected system elements.

Entenman further discloses in case of multiple failures, allotting a spare device among the devices in accordance with a priority algorithm (see column 6 lines 38-42).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to combine the teachings of Harper and Entenman to allot a spare device among the devices in accordance with a priority algorithm, thus indicating at least partially on a protection switching priority for at least a portion of said protected system elements. A person of ordinary skill in the art could have been motivated to combine the teachings because Harper is concerned with failing over nodes (see column 2 lines 23-26; figure 5b and column 6 lines 39-42), and allotting a spare device among the devices in accordance with a priority algorithm, as per teachings of Entenman (see column 6 lines 38-42), constitutes as suitable known means for failing over nodes that further enables recovery of higher priority device.

Downes further discloses the concept of predicting a failure upon determination the error count over a selected number of operations is above a criterion or threshold (see column 1 lines 60-65).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to combine the teachings of Harper, Entenman, and Downes to further including predicting a failure upon determination the error count over a selected number of operations is above a criterion or threshold, thus indicating wherein identifying the failure predicted on of said protected system elements includes assessing performance of said protected system elements based at least partially on an element demerit point level of each one of said protected system elements. A person of ordinary skill in the art could have been motivated to combine the teachings because Harper is concerned with detecting degradation of performance of a computer system (see column 1 lines 60-65), and monitoring the error count over a selected number of operations, as per teachings of Downes (see column 1 lines 60-65), constitutes as suitable known means to detect degradation of performance of a computer system.

With respect to claim 1, the Examiner alleges "A person of ordinary skill in the art could have been motivated to combine the teachings because Harper is concerned with failing over nodes (see column 2 lines 23-26; figure 5b and column 6 lines 39-42), and allotting a spare device among the devices in accordance with a priority algorithm, as per teachings of Entenman (see column 6 lines 38-42), constitutes as suitable known means for failing over nodes that further enables recovery of higher priority device." While the Examiner alleges various teachings with respect to different references, even assuming arguendo the merit of the Examiner's allegations, Applicant submits "a patent composed of several elements is not proved obvious merely by demonstrating that each of its elements is, independently, known in the prior art." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 405, 418 (2007). While the Examiner the relies on alleged teachings of the Entenman '342, Harper et al. '398, and Downes et al. '761 references, Applicant notes the Harper et al. '398 reference is classified in different U.S. classifications and appears to have been subjected to mutually exclusive fields of search

as compared to the Entenman '342 and Downes et al. '761 references. Thus, Applicant submits one of ordinary skill in the art would not have been led to attempt to combine the alleged teachings. Applicant submits the Examiner has not provided a plausible rationale as to why the prior art references would have worked together to render the claims obvious. *Power-One, Inc. v. Artesyn Techs., Inc.*, 599 F.3d 1343 (Fed. Cir. 2010). As an example, Applicant submits the Examiner has not cited any portion of any of the cited references with respect to the Examiner's allegation of "...constitutes as suitable known means for failing over nodes that further enables recovery of higher priority device." Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 1.

With respect to claim 1, the Examiner alleges "A person of ordinary skill in the art could have been motivated to combine the teachings because Harper is concerned with detecting degradation of performance of a computer system (see column 1 lines 60-65), and monitoring the error count over a selected number of operations, as per teachings of Downes (see column 1 lines 60-65), constitutes as suitable known means to detect degradation of performance of a computer system." While the Examiner alleges various teachings with respect to different references, even assuming arguendo the merit of the Examiner's allegations, Applicant submits "a patent composed of several elements is not proved obvious merely by demonstrating that each of its elements is, independently, known in the prior art." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 405, 418 (2007). While the Examiner relies on alleged teachings of the Entenman '342, Harper et al. '398, and Downes et al. '761 references, Applicant notes the Harper et al. '398 reference is classified in different U.S. classifications and appears to have been subjected to mutually exclusive fields of search as compared to the Entenman '342 and Downes et al. '761 references. Thus, Applicant submits one of ordinary skill in the art would not have been led to attempt to combine the alleged teachings. Applicant submits the Examiner has not provided a plausible rationale as to why the prior art references would have worked together to render the claims obvious. *Power-One, Inc. v. Artesyn Techs., Inc.*, 599 F.3d 1343 (Fed. Cir. 2010). As an example, Applicant submits the Examiner has not cited any portion of any of the cited references with respect to the Examiner's allegation of "...to detect degradation of performance of a computer system." Furthermore, while the Examiner cites "(see column 1 lines 60-65)" as to "Harper is concerned with detecting degradation of performance of a computer system," Applicant sees no teaching as to "detecting..." in the cited portion of the cited reference. Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 1.

Furthermore, while the Examiner alleges "It would have been obvious to one of ordinary skill in the art at the time the invention was made to combine the teachings of Harper, Entenman, and Downes...", Applicant note the Examiner alleges motivation only as combining "the teachings of Harper..., as per teachings of Downes." Thus, Applicant submits the alleged motivation does not appear to pertain to the alleged combination. Therefore, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 1.

Regarding claim 1, Applicant submits the cited portions of the cited references fail to render obvious the subject matter of claim 1. As an example, Applicant submits the cited portions of the cited references fail to disclose or suggest "wherein identifying the failure predicted one of said protected system elements includes assessing performance of said protected system elements based at least partially on an element demerit point level of each one of said protected system elements." While the Examiner cites "(see column 1 lines 60-65)" of the Downes reference, Applicant notes such portion merely recites "U.S. Pat. No. 4,339,657 describes a technique for error logging by integrating error counts over a selected number of operations and comparing the results with a criterion. An exception is logged if the number of errors exceeds the criterion, but the exception log is cleared if the number of errors is less than the criterion." Applicant submits the cited portions of the cited reference fail to teach or suggest applying the "technique for error logging" mentioned in the Downes reference to "...each one of said protected system elements." Moreover, Applicant submits the cited portion of the cited reference appears to teach away from such modification, as Applicant submits the "technique for error logging" appears to discard its "exception log" when "the exception log is cleared." Furthermore, Applicant submits the Examiner's assertion that "Downes discloses the concept of predicting a failure..." is unsupported by the cited portion of the cited reference, as Applicant sees no disclosure of such "concept," and, moreover, claim 1 is not directed to a "concept."

Also, while the Examiner cites "(see column 6 lines 38-42)" of the Entenman reference as allegedly disclosing "in case of multiple failures, allotting a spare device among the devices in accordance with a priority algorithm," Applicant submits column 6, lines 35-38, refer to "the FIG. 1 arrangement" and refer to "a logic circuit 18 hierarchy," while column 6, lines 38-42, refers to "the arrangement of FIG. 2," "microprocessor controlled apparatus," "the spare modem," and "modules 10," and does not mention "in case of multiple failures." Thus, Applicant submits the Examiner alleges supposed teachings not found in the cited portion of the Entenman reference.

As another example, Applicant submits the cited portions of the cited references fail to disclose or suggest "identifying a failure predicted one of a plurality of protected system elements." While the Examiner cites "(see column 2 lines 19-23)" and "(see column 4 lines 23-27)," Applicant submits such portions merely recite "...monitoring the primary node of the computer system..." and "...determining whether the primary node is failing or about to fail..." not "...a plurality of protected system elements." Therefore, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to the subject matter of claim 1. Thus, Applicant submits claim 1 is in condition for allowance.

Claim 2:

Regarding claim 2, the Examiner states as follows:

In regards to claim 2, Harper '398 in view of Entenman and Downes discloses the claim limitations as discussed above. Harper '398 further discloses wherein identifying the failure predicted one of said protected system elements includes assessing at least one of a plurality of failure prediction parameters of said protected system elements for determining when a failure prediction condition has been met by one of said protected system elements (see column 9 lines 15-20 of incorporated by reference Harper '266).

Regarding Claim 2, Applicant submits the cited portions of the cited references fail to render obvious the subject matter of claim 2. As an example, Applicant submits the cited portions of the cited references fail to disclose or suggest "wherein identifying the failure predicted one of said protected system elements includes assessing at least one of a plurality of failure prediction parameters of said protected system elements for determining when a failure prediction condition has been met by one of said protected system elements." While the Examiner cites "(see column 9 lines 15-20 of incorporated by reference Harper '266)," Applicant notes such portions merely recites "In single parameter monitoring, a rejuvenation agent monitors a small set of parameters and triggers rejuvenation when one or more of them approaches a predefined resource exhaustion threshold or characteristic hazardous value. This is effective for scenarios where a small number of primary indicators are found which reliably indicate resource exhaustion." Applicant submits such "monitoring" does not disclose or suggest "...identifying the failure predicted one of said protected system elements..." as Applicant sees no teaching or suggestion as to "...said protected system elements." Thus, Applicant submits claim 2 is in condition for allowance.

Claim 3:

Regarding claim 3, the Examiner states as follows:

In regards to claim 3, Harper '398 in view of Entenman and Downes discloses the claim limitations as discussed above. Harper '398 further discloses

monitoring a failure prediction parameter of at least one of the plurality of protected system elements (see column 9 lines 15-20 of incorporated by reference Harper '266); and

correlating a present state of the failure prediction parameter to a failure prediction criterion for determining whether the failure prediction parameter has met a failure prediction condition (see column 9 lines 15-20 of incorporated by reference Harper '266).

Regarding Claim 3, Applicant submits the cited portions of the cited references fail to render obvious the subject matter of claim 3. As an example, Applicant submits the cited portions of the cited references fail to disclose or suggest "correlating a present state of the failure prediction parameter to a failure prediction criterion for determining whether the failure prediction parameter has met a failure prediction condition." While the Examiner cites "(see column 9 lines 15-20 of incorporated by reference Harper '266)," Applicant submits the cited portion of the cited reference fails to disclose or suggest "...determining whether the failure prediction parameter has met a failure prediction condition," as Applicant sees no teaching or suggestion as to "...failure prediction condition" or even "...has met...." Thus, Applicant submits claim 3 is in condition for allowance.

Claim 5:

Regarding claim 5, the Examiner states as follows:

In regards to claim 5, Harper '398 in view of Entenman and Downes discloses the claim limitations as discussed above. Harper '398 further discloses wherein the monitoring the failure prediction parameter further comprises bridging the protection system element across the at least one of the plurality of the protected system elements (see column 6 lines 13-17).

Regarding Claim 5, Applicant submits the cited portions of the cited references fail to render obvious the subject matter of claim 5. As one example, Applicant submits the cited portions of the cited references fail to disclose or suggest "wherein the monitoring the failure prediction parameter further comprises bridging the protection system element across the at least one of the plurality of the protected system elements." While the Examiner cites "(see column 6 lines 13-17)," Applicant submits such portion of the cited reference recites "...dynamic system updates..." which Applicant submits

does not teach or suggest "...the monitoring the failure prediction parameter further comprising...."

Thus, Applicant submits claim 5 is in condition for allowance.

Claim 10:

Regarding claim 10, the Examiner states as follows:

In regards to claim 10, Harper '398 in view of Entenman and Downes discloses the claim limitations as discussed above. Downes further discloses wherein assessing performance of said protected system elements includes determining when an element demerit point level of one of said protected system elements has exceeded a predetermined element demerit point threshold limit (see column 1 lines 60-65).

Regarding Claim 10, Applicant submits the cited portions of the cited references fail to render obvious the subject matter of claim 10. Applicant has presented arguments for the allowability of claim 1, from which claim 10 depends. Thus, Applicant submits claim 10 is in condition for allowance.

Claim 12:

Regarding claim 12, the Examiner states as follows:

In regards to claim 12, Harper '398 in view of Entenman and Downes discloses the claim limitations as discussed above. Downes further discloses wherein the element demerit point level corresponds to a quantity of element demerit points accumulated over a designated period of time (see column 1 lines 60-65).

Regarding Claim 12, Applicant submits the cited portions of the cited references fail to render obvious the subject matter of claim 12. As an example, Applicant submits the cited portions of the cited references fail to teach or suggest "...wherein the element demerit point level corresponds to a quantity of element demerit points accumulated over a designated period of time." While the Examiner cites "(see column 1 lines 60-65)" of the Downes reference, Applicant submits the cited portion of the cited reference fails to disclose or suggest, for example, "...over a designated period of time." Thus, Applicant submits claim 12 is in condition for allowance.

Claim 13:

Regarding claim 13, the Examiner states as follows:

In regards to claim 13, Harper '398 in view of Entenman and Downes discloses the claim limitations as discussed above. Downes further discloses wherein identifying the failure predicted one of said

protected system elements includes determining that a rate of change of element demerit points for one of said protected system elements has exceeded a predetermined element demerit point rate of change (see column 1 lines 60-65).

Regarding claim 13, Applicant submits the cited portions of the cited references fail to render obvious the subject matter of claim 13. As one example, Applicant submits the cited portions of the cited references fail to teach or suggest "...wherein identifying the failure predicted one of said protected system elements includes determining that a rate of change of element demerit points for one of said protected system elements has exceeded a predetermined element demerit point rate of change threshold limit." While the Examiner cites "(see column 1 lines 60-65)" of the Downes reference, Applicant submits the cited portion of the cited reference teaches away from the subject matter of claim 13. While claim 13 recites "...a rate of change of element demerit points..." Applicant notes the cited portion of the cited reference recites "...integrating error counts...." Thus, Applicant submits claim 13 is in condition for allowance.

Claim 15:

Regarding claim 15, the Examiner states as follows:

In regards to claim 15, Harper '398 in view of Entenman and Downes discloses the claim limitations as discussed above. Entenman further discloses determining that a protection switching priority among a collection of failure predicted system elements applies to the failure predicted one of said protected system elements (see column 6 lines 38-42).

Regarding claim 15, Applicant submits the cited portions of the cited references fail to render obvious the subject matter of claim 15. As one example, Applicant submits the cited portions of the cited references fail to teach or suggest "determining that a protection switching priority among a collection of failure predicted system elements applies to the failure predicted one of said protected system elements." While the Examiner cites "(see column 6 lines 38-42)" of the Entenman reference as allegedly disclosing such subject matter, Applicant submits such portion of the cited reference fails to disclose, for example, "...applies to the failure predicted one of said protected system elements." Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 15. Therefore, Applicant submits claim 15 is in condition for allowance.

Claim 16:

Regarding claim 16, the Examiner states as follows.

In regards to claim 16, Harper '398 in view of Entenman and Downes discloses the claim limitations as discussed above. Entenman further discloses wherein implementing the protection switching operation is initiated after determining that the protection switching priority applies to the failure predicted one of said protected system elements (see column 6 lines 38-42).

Regarding claim 16, Applicant submits the cited portions of the cited references fail to render obvious the subject matter of claim 16. As one example, Applicant submits the cited portions of the cited references fail to teach or suggest "...wherein implementing the protection switching operation is initiated after determining that the protection switching priority applies to the failure predicted one of said protected system elements." While the Examiner cites "(see column 6 lines 38-42)" of the Entenman reference as allegedly disclosing such subject matter, Applicant submits such portion of the cited reference fails to disclose, for example, "...is initiated after determining that the protection switching priority applies to the failure predicted one of said protected system elements." Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 16. Therefore, Applicant submits claim 16 is in condition for allowance.

Claim 17:

Regarding claim 17, the Examiner states as follows:

In regards to claim 17, Harper '398 in view of Entenman and Downes discloses the claim limitations as discussed above. Entenman further discloses wherein determining that the protection switching priority applies to the failure predicted one of said protected system elements includes assessing a protection switching priority parameter for each system element of the collection of failure predicted system elements (see column 6 lines 38-42).

Regarding claim 17, Applicant submits the cited portions of the cited references fail to render obvious the subject matter of claim 17. As one example, Applicant submits the cited portions of the cited references fail to teach or suggest "...wherein determining that the protection switching priority applies to the failure predicted one of said protected system elements includes assessing a protection switching priority parameter for each system element of the collection of failure predicted system elements." While the Examiner cites "(see column 6 lines 38-42)" of the Entenman reference as allegedly disclosing such subject matter, Applicant submits such portion of the cited reference fails to disclose, for example, "...includes assessing a protection switching priority parameter for each system element of the collection of failure predicted system elements." Thus, Applicant submits the Examiner

has not made a *prima facie* showing of obviousness with respect to claim 17. Therefore, Applicant submits claim 17 is in condition for allowance.

Claim 18:

Regarding claim 18, the Examiner states as follows:

In regards to claim 18, Harper '398 in view of Entenman and Downes discloses the claim limitations as discussed above. Downes further discloses wherein assessing the protection switching parameter includes assessing at least one of a parameter relating to element demerit points, a parameter relating to a rate of change of said element demerit points, a parameter relating to an element demerit point threshold limit, a parameter relating to a number of active connections, a parameter relating to a number of active service subscribers, a parameter designated in a service agreement, a mounted position in a network element, an administrator-assigned priority value, a data bit rate and a rate of change of the data bit rate (see column 1 lines 60-65).

Regarding claim 18, Applicant submits the cited portions of the cited references fail to render obvious the subject matter of claim 18. As one example, Applicant submits the cited portions of the cited references fail to teach or suggest "...wherein assessing the protection switching parameter includes assessing at least one of a parameter relating to element demerit points, a parameter relating to a rate of change of said element demerit points, a parameter relating to an element demerit point threshold limit, a parameter relating to a number of active connections, a parameter relating to a number of active service subscribers, a parameter designated in a service agreement, a mounted position in a network element, an administrator-assigned priority value, a data bit rate and a rate of change of the data bit rate." While the Examiner cites "(see column 1 lines 60-65)" of the Downes reference as allegedly disclosing such subject matter, Applicant submits such portion of the cited reference fails to disclose, for example, "...assessing the protection switching parameter...." Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 18. Therefore, Applicant submits claim 18 is in condition for allowance.

Claim 19:

Regarding claim 19, the Examiner states as follows:

In regards to claim 19, Harper '398 in view of Entenman and Downes discloses the claim limitations as discussed above. Harper '398 further discloses:

downloading service information of the failure predicted one of said protected system elements to the protection system element after identifying the failure predicted one of said protected system elements (see column 6 lines 14-17);

confirming failure of the first failure predicted one of said protected system elements (see column 6 lines 18-25); and

switching communication service supported by the failure predicted one of said protected system elements for being supported by to the protection system element after confirming said failure (see column 6 lines 21-25).

Regarding Claim 19, Applicant submits the cited portions of the cited references fail to render obvious the subject matter of claim 19. As one example, Applicant submits the cited portions of the cited references fail to teach or suggest "downloading service information of the failure predicted one of said protected system elements to the protection system element after identifying the failure predicted one of said protected system elements." As Applicant noted with respect to claim 1, from which claim 19 depends, Applicant submits the cited portion of the cited reference fails to teach or suggest "identifying a failure predicted one of a plurality of protected system elements." Thus, Applicant submits claim 19 is in condition for allowance.

Claim 23:

Regarding claim 23, the Examiners states as follows:

In regards to claim 23, Harper '398 in view of Entenman and Downes discloses the claim limitations as discussed above. Harper '398 further discloses wherein the protection system element provides protection switching functionality exclusively for all of said protected system elements (see column 6 lines 35-40).

Regarding Claim 23, Applicant submits the cited portions of the cited references fail to render obvious the subject matter of claim 23. As one example, Applicant submits the cited portions of the cited references fail to teach or suggest "...wherein the protection system element provides protection switching functionality exclusively for all of said protected system elements." While the Examiner cites "(see column 6 lines 35-40)" of the Harper '398 reference, Applicant notes col. 6, lines 21-25, of the cited reference states, "...at which time the secondary node becomes the primary node, and the primary node is rebooted and subsequently becomes the secondary node." Applicant submits such teaching teaches away from the subject matter of claim 23. Thus, Applicant submits claim 23 is in condition for allowance.

Claim 27:

Regarding claim 27, the Examiner states as follows:

In regards to claim 27, Harper '398 in view of Entenman and Downes discloses the claim limitations as discussed above. Harper '398 further discloses wherein identifying the failure predicted one of said protected system elements includes determining that a failure prediction parameter associated with the failure predicted one of said protected system elements has exceeded a failure prediction parameter first threshold limit (see column 9 lines 6-10 and 25-28 of incorporated by reference Harper '266).

Regarding Claim 27, Applicant submits the cited portions of the cited references fail to render obvious the subject matter of claim 27. As one example, Applicant submits the cited portions of the cited references fail to teach or suggest "...wherein identifying the failure predicted one of said protected system elements includes determining that a failure prediction parameter associated with the failure predicted one of said protected system elements has exceeded a failure prediction parameter first threshold limit." While the Examiner cites "(see column 9 lines 6-10 and 25-28 of incorporated by reference Harper '266)," Applicant notes col. 9, lines 25-28, of the Harper '266 reference states "FIG. 7 illustrates, for example, the growth in consumption over time of a typical resource (e.g., non-paged pool bytes), toward an upper limit." Applicant submits the cited portion of the cited reference fails to disclose "...has exceeded a failure prediction parameter first threshold limit." Thus, Applicant submits claim 27 is in condition for allowance.

Claim 29:

Regarding claim 29, the Examiner states as follows:

In regards to claim 29, Harper '398 in view of Entenman and Downes discloses the claim limitations as discussed above. Harper '398 further discloses wherein the protection system element provides protection switching functionality exclusively for all of said protected system elements (see column 6 lines 35-37).

Regarding Claim 29, Applicant submits the cited portions of the cited references fail to render obvious the subject matter of claim 29. As one example, Applicant submits the cited portions of the cited references fail to teach or suggest "...wherein the protection system element provides protection switching functionality exclusively for all of said protected system elements." While the Examiner cites "(see column 6 lines 35-37)" of the Harper '398 reference, Applicant submits col. 6, lines 21-25, of the cited reference states, "...at which time the secondary node becomes the primary node, and the primary node is rebooted and subsequently becomes the secondary node." Applicant submits such

teaching teaches away from the subject matter of claim 29. Thus, Applicant submits claim 29 is in condition for allowance.

Claim 30:

Regarding claim 30, the Examiner states as follows:

In regards to claim 30, Harper '398 in view of Entenman and Downes discloses the claim limitations as discussed above. Harper '398 further discloses configuring protection switching variables associated with the protection switching operation (see column 9 lines 7-14 of incorporated by reference Harper '266).

Regarding Claim 30, Applicant has submitted arguments for the allowability of claim 1, from which claim 30 depends. Thus, Applicant submits claim 30 is also in condition for allowance.

Claim 35:

Regarding claim 35, the Examiner states as follows:

In regards to claim 35, Harper '398 in view of Entenman and Downes discloses the claim limitations as discussed above. Harper '398 further discloses wherein identifying the failure predicted one of said protected system elements includes assessing a protection switching operation initiation notification issued via a system administrator user interface (see column 4 lines 20-22 of incorporated by reference Harper '266).

Regarding Claim 35, Applicant submits the cited portions of the cited references fail to render obvious the subject matter of claim 35. As one example, Applicant submits the cited portions of the cited references fail to teach or suggest "...wherein identifying the failure predicted one of said protected system elements includes assessing a protection switching operation initiation notification issued via a system administrator user interface." While the Examiner cites, "see column 4 lines 20-22 of incorporated by reference Harper '266)," Applicant submit the cited portion of the cited reference recites "...the system operator can...initiate a graceful planned outage..." which Applicant submits fails to teach or suggest the subject matter of claim 35. Thus, Applicant submits claim 35 is in condition for allowance.

Claim 36:

Regarding claim 36, the Examiner states as follows:

In regards to claim 36, Harper '398 in view of Entenman and Downes discloses the claim limitations as discussed above. Harper '398 further discloses:

downloading service information of the failure predicted one of said protected system elements to the protection system element after identifying the failure predicted one of said protected system elements (see column 6 lines 14-17);

switching communication service supported by the failure predicted one of said protected system elements for being supported by to the protection system element after downloading said service information (see column 6 lines 21-25).

Regarding claim 36, Applicant submits the cited portions of the cited references fail to render obvious the subject matter of claim 36. As one example, Applicant submits the cited portions of the cited references fail to teach or suggest "downloading service information of the failure predicted one of said protected system elements to the protection system element after identifying the failure predicted one of said protected system elements." As one example, Applicant submits the cited portions of the cited references fail to teach or suggest "downloading service information of the failure predicted one of said protected system elements to the protection system element after identifying the failure predicted one of said protected system elements." As Applicant noted with respect to claim 1, from which claim 36 indirectly depends, Applicant submits the cited portion of the cited reference fails to teach or suggest "identifying a failure predicted one of a plurality of protected system elements." Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 36. Therefore, Applicant submits claim 36 is in condition for allowance.

Rejection of claims 11, 24-26, and 28 under 35 U.S.C. § 103(a):

The Examiner has rejected claims 11, 24-26, and 28 under 35 U.S.C. § 103(a) as allegedly being unpatentable over U.S. Patent No. 6,978,398 (Harper '398 (which incorporates by reference Harper '266)) in view of U.S. Patent No. 4,245,342 of Entenman and US Patent No. 4,769,761 of Downes et al., and further in view of US Patent No. 6,771,440 of Smith.

Claim 11:

Regarding claim 11, the Examiner states as follows:

In regard to claim 11, Harper '398 in view of Entenman and Downes discloses the claim limitations as discussed above. However, Harper '398 in view of Entenman and Downes fails to explicitly disclose:

wherein the predetermined element demerit point threshold limit is associated with a first level of failure probability, lower than an element demerit point threshold limit corresponding to a next higher level of failure probability.

Smith discloses a system wherein a first threshold triggers a predictive failure analysis and a second threshold greater than the first threshold signifies a failure (see column 6 lines 620).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to combine the teachings of Harper, Entenman, Downes, and Smith to include a second threshold that signifies a failure in addition to a first threshold that predicts a failure, indicating wherein the predetermined element demerit point threshold limit is associated with a first level of failure probability, lower than an element demerit point threshold limit corresponding to a next higher level of failure probability. A person of ordinary skill in the art could have been motivated to combine the teachings because Harper discloses a first threshold that predicts a failure is to follow (see column 9 lines 7-14 and lines 25-30 of incorporated by reference Harper '266) and is further concerned with signifying a system element has failed (see column 6 lines 5-25) and having a second threshold that signifies a failure, as per teachings of Smith (see column 6 lines 6-20), provides a known and suitable means to signifying the system element has failed.

With respect to claim 11, the Examiner alleges "A person of ordinary skill in the art could have been motivated to combine the teachings because Harper discloses a first threshold that predicts a failure is to follow (see column 9 lines 7-14 and lines 25-30 of incorporated by reference Harper '266) and is further concerned with signifying a system element has failed (see column 6 lines 5-25) and having a second threshold that signifies a failure, as per teachings of Smith (see column 6 lines 6-20), provides a known and suitable means to signifying the system element has failed." While the Examiner alleges various teachings with respect to different references, even assuming arguendo the merit of the Examiner's allegations, Applicant submits "a patent composed of several elements is not proved obvious merely by demonstrating that each of its elements is, independently, known in the prior art." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 405, 418 (2007). While the Examiner relies on alleged teachings of the Entenman '342, Harper et al. '398, Downes et al. '761, and Smith '440 references, Applicant notes the Smith '440 reference is classified in different U.S. classifications and appears to have been subjected to mutually exclusive fields of search as compared to the Entenman '342 and Downes et al. '761 references. Thus, Applicant submits one of ordinary skill in the art would not have been led to attempt to combine the alleged teachings. Applicant submits the Examiner has not provided a plausible rationale as to why the prior art references would have worked together to render the claims obvious. *Power-One, Inc. v. Artesyn Techs., Inc.*, 599 F.3d 1343 (Fed. Cir. 2010). As an example, Applicant submits the Examiner has alleged motivation only as to combining "the teachings" of "Harper,...as per teachings of Smith," but has not alleged motivation to combine alleged teachings of all of the cited references. Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 11.

Regarding claim 11, Applicant submits the cited portions of the cited references fail to render obvious the subject matter of claim 11. As one example, Applicant submits the cited references fail to

teach or suggest "...wherein the predetermined element demerit point threshold limit is associated with a first level of failure probability, lower than an element demerit point threshold limit corresponding to a next higher level of failure probability." While the Examiner cites, "(see column 6 lines 6-20)" of the Smith reference, Applicant submits the Smith reference pertains to adaptive event-based predictive analysis measurements in a hard disk drive. Accordingly, Applicant submits the Smith reference is non-analogous art. Moreover, Applicant notes the Examiner cited the Smith reference on the Form PTO-892 enclosed with the first Office action, where the Examiner characterized claim 11 as "Allowable Subject Matter" and stated claim 11 was "objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims." Applicant notes MPEP § 706.04 "Rejection of Previously Allowed Claims" states as follows:

A claim noted as allowable shall thereafter be rejected only after the proposed rejection has been submitted to the primary examiner for consideration of all the facts and approval of the proposed action.

Great care should be exercised in authorizing such a rejection. See *Ex parte Grier*, 1923 C.D. 27, 309 O.G. 223 (Comm'r Pat. 1923); *Ex parte Hay*, 1909 C.D. 18, 139 O.G. 197 (Comm'r Pat. 1909).

Accordingly, Applicant submits the Examiner's rejection appears to be inconsistent with MPEP § 706.04. Furthermore, Applicant has presented arguments for the allowability of claims 1, from which claim 11 depends. Thus, Applicant submits claim 11 is in condition for allowance.

Claim 24:

Regarding claim 24, the Examiner states as follows:

In regards to claims 24, Harper '398 in view of Entenman and Downes discloses the claim limitations as discussed above. Harper '398 further discloses:

wherein identifying the failure predicted one of said protected system elements includes determining that a failure prediction parameter associated with the failure predicted one of said protected system elements has exceeded a failure prediction parameter first threshold limit (see column 9 lines 6-10 and 25-28 of incorporated by reference Harper '266);

Harper further discloses said switching communication service is initiated in response to determining the protected system element has failed. Harper discloses if it is determined that the primary node has failed, then the process continues at which time the secondary node becomes the primary node (see column 6 lines 21-25).

However, Harper '398 in view of Entenman and Downes fails to explicitly disclose:

said switching communication service is initiated in response to the failure prediction parameter exceeding a failure prediction parameter second threshold limit different than the failure prediction parameter first threshold limit.

Smith discloses a system wherein a first threshold triggers a predictive failure analysis and a second threshold greater than the first threshold signifies a failure (see column 6 lines 620).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to combine the teaching of Harper, Entenman, Downes, and Smith to include a second threshold that signifies a failure in addition to a first threshold that predicts a failure, thus indicating said switching communication service is initiated in response to the failure prediction parameter exceeding a failure prediction parameter second threshold limit different than the failure prediction parameter first threshold limit. A person of ordinary skill in the art could have been motivated to combine the teaching because Harper discloses a first threshold that predicts a failure is to follow (see column 9 lines 7-14 and lines 25-30 of incorporated by reference Harper '266) and is further concerned with signifying a system element has failed (see column 6 lines 525) and having a second threshold that signifies a failure, as per teachings of Smith (see column 6 lines 6-20), provides a known and suitable means to signifying the system element has failed.

With respect to claim 24, the Examiner alleges "A person of ordinary skill in the art could have been motivated to combine the teachings because Harper discloses a first threshold that predicts a failure is to follow (see column 9 lines 7-14 and lines 25-30 of incorporated by reference Harper '266) and is further concerned with signifying a system element has failed (see column 6 lines 5-25) and having a second threshold that signifies a failure, as per teachings of Smith (see column 6 lines 6-20), provides a known and suitable means to signifying the system element has failed." While the Examiner alleges various teachings with respect to different references, even assuming arguendo the merit of the Examiner's allegations, Applicant submits "a patent composed of several elements is not proved obvious merely by demonstrating that each of its elements is, independently, known in the prior art." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 405, 418 (2007). While the Examiner relies on alleged teachings of the Entenman '342, Harper et al. '398, Downes et al. '761, and Smith '440 references, Applicant notes the Smith '440 reference is classified in different U.S. classifications and appears to have been subjected to mutually exclusive fields of search as compared to the Entenman '342 and Downes et al. '761 references. Thus, Applicant submits one of ordinary skill in the art would not have been led to attempt to combine the alleged teachings. Applicant submits the Examiner has not provided a plausible rationale as to why the prior art references would have worked together to render the claims obvious. *Power-One, Inc. v. Artesyn Techs., Inc.*, 599 F.3d 1343 (Fed. Cir. 2010). As an example, Applicant submits the Examiner has alleged motivation only as to combining "the teachings" of "Harper,...as per teachings of Smith," but has not alleged motivation to combine alleged teachings of all of the cited references. Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 24.

As to claim 24, Applicant notes the Smith reference pertains to adaptive event-based predictive analysis measurements in a hard disk drive. Accordingly, Applicant submits the Smith reference is non-analogous art. Moreover, Applicant has presented arguments for the allowability of claims 1 and 19, from which claim 24 depends. Thus, Applicant submits claim 24 is also in condition for allowance.

Claim 25:

Regarding claim 25, the Examiner states as follows:

In regards to claim 25, Harper '398 in view of Downes, Entenman, and Smith discloses the claim limitations as discussed above. Smith further discloses:

wherein the failure prediction first threshold limit is associated with a first level of failure probability and the failure prediction second threshold limit is associated with a second level of failure probability higher than the first level of failure probability (see column 6 lines 12-13).

As to claim 25, Applicant notes the Smith reference pertains to adaptive event-based predictive analysis measurements in a hard disk drive. Accordingly, Applicant submits the Smith reference is non-analogous art. Moreover, Applicant has presented arguments for the allowability of claims 1 and 19, from which claim 25 indirectly depends. Thus, Applicant submits claim 25 is also in condition for allowance.

Claim 26:

Regarding claim 26, the Examiner states as follows:

In regards to claim 26, Harper '398 in view of Downes, Entenman, and Smith discloses the claim limitations as discussed above. Harper '398 further discloses:

wherein identifying the failure predicted one of said protected system elements includes determining that a failure prediction parameter associated with the failure predicted one of said protected system elements has exceeded a failure prediction parameter first threshold limit (see column 9 lines 6-10 and 25-28 of incorporated by reference Harper '266);

Harper further discloses confirming failure includes determining the protected system element has failed (see column 6 lines 21-25).

However, Harper '398 in view of Entenman and Downes fails to explicitly disclose:

confirming failure includes determining that the failure prediction parameter has exceeded a failure prediction parameter second threshold limit different than the failure prediction parameter first threshold limit.

Smith discloses a system wherein a first threshold triggers a predictive failure analysis and a second threshold greater than the first threshold signifies a failure (see column 6 lines 620).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to combine the teachings of Harper, Entenman, Downes, and Smith to include a second threshold that signifies a failure in addition to a first threshold that predicts a failure, thus indicating confirming failure includes determining that the failure prediction parameter has exceeded a failure prediction parameter second threshold limit different than the failure prediction parameter first threshold limit. A person of ordinary skill in the art could have been motivated to combine the teaching because Harper discloses a first threshold that predicts a failure is to follow (see column 9 lines 7-14 and lines 25-30 of incorporated by reference Harper '266) and is further concerned with signifying a system element has failed (see column 6 lines 5-25) and having a second threshold that signifies a failure, as per teachings of Smith (see column 6 lines 6-20), provides a known and suitable means to signifying the system element has failed.

With respect to claim 26, the Examiner alleges "A person of ordinary skill in the art could have been motivated to combine the teachings because Harper discloses a first threshold that predicts a failure is to follow (see column 9 lines 7-14 and lines 25-30 of incorporated by reference Harper '266) and is further concerned with signifying a system element has failed (see column 6 lines 5-25) and having a second threshold that signifies a failure, as per teachings of Smith (see column 6 lines 6-20), provides a known and suitable means to signifying the system element has failed." While the Examiner alleges various teachings with respect to different references, even assuming arguendo the merit of the Examiner's allegations, Applicant submits "a patent composed of several elements is not proved obvious merely by demonstrating that each of its elements is, independently, known in the prior art." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 405, 418 (2007). While the Examiner relies on alleged teachings of the Entenman '342, Harper et al. '398, Downes et al. '761, and Smith '440 references, Applicant notes the Smith '440 reference is classified in different U.S. classifications and appears to have been subjected to mutually exclusive fields of search as compared to the Entenman '342 and Downes et al. '761 references. Thus, Applicant submits one of ordinary skill in the art would not have been led to attempt to combine the alleged teachings. Applicant submits the Examiner has not provided a plausible rationale as to why the prior art references would have worked together to render the claims obvious. *Power-One, Inc. v. Artesyn Techs., Inc.*, 599 F.3d 1343 (Fed. Cir. 2010). As an example, Applicant submits the Examiner has alleged motivation only as to combining "the teachings" of "Harper,...as per teachings of Smith," but has not alleged motivation to combine alleged teachings of all of the cited references. Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 26.

As to claim 26, Applicant notes the Smith reference pertains to adaptive event-based predictive analysis measurements in a hard disk drive. Accordingly, Applicant submits the Smith reference is

non-analogous art. Moreover, Applicant has presented arguments for the allowability of claims 1 and 19, from which claim 26 depends. Thus, Applicant submits claim 26 is also in condition for allowance.

Claim 28:

Regarding claim 28, the Examiner states as follows:

In regards to claim 28, Harper '398 in view of Entenman and Downes discloses the claim limitations as discussed above. However, Harper '398 in view of Entenman and Downes fails to explicitly disclose:

wherein implementing said protection switching operation is performed in response to determining that the failure prediction parameter has exceeded a failure prediction parameter second threshold limit different than the failure prediction parameter first threshold limit.

Smith discloses a system wherein a first threshold triggers a predictive failure analysis and a second threshold greater than the first threshold signifies a failure (see column 6 lines 620).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to combine the teachings of Harper, Entenman, Downes, and Smith to include a second threshold that signifies a failure in addition to a first threshold that predicts a failure, thus indicating wherein implementing said protection switching operation is performed in response to determining that the failure prediction parameter has exceeded a failure prediction parameter second threshold limit different than the failure prediction parameter first threshold limit. A person of ordinary skill in the art could have been motivated to combine the teaching because Harper discloses a first threshold that predicts a failure is to follow (see column 9 lines 7-14 and lines 25-30 of incorporated by reference Harper '266) and is further concerned with signifying a system element has failed (see column 6 lines 5-25) and having a second threshold that signifies a failure, as per teachings of Smith (see column 6 lines 6-20), provides a known and suitable means to signifying the system element has failed.

With respect to claim 28, the Examiner alleges "A person of ordinary skill in the art could have been motivated to combine the teachings because Harper discloses a first threshold that predicts a failure is to follow (see column 9 lines 7-14 and lines 25-30 of incorporated by reference Harper '266) and is further concerned with signifying a system element has failed (see column 6 lines 5-25) and having a second threshold that signifies a failure, as per teachings of Smith (see column 6 lines 6-20), provides a known and suitable means to signifying the system element has failed." While the Examiner alleges various teachings with respect to different references, even assuming *arguendo* the merit of the Examiner's allegations, Applicant submits "a patent composed of several elements is not proved obvious merely by demonstrating that each of its elements is, independently, known in the prior art." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 405, 418 (2007). While the Examiner the relies on alleged teachings of the Entenman '342, Harper et al. '398, Downes et al. '761, and Smith '440

references, Applicant notes the Smith '440 reference is classified in different U.S. classifications and appears to have been subjected to mutually exclusive fields of search as compared to the Entenman '342 and Downes et al. '761 references. Thus, Applicant submits one of ordinary skill in the art would not have been led to attempt to combine the alleged teachings. Applicant submits the Examiner has not provided a plausible rationale as to why the prior art references would have worked together to render the claims obvious. *Power-One, Inc. v. Artesyn Techs., Inc.*, 599 F.3d 1343 (Fed. Cir. 2010). As an example, Applicant submits the Examiner has alleged motivation only as to combining "the teachings" of "Harper,...as per teachings of Smith," but has not alleged motivation to combine alleged teachings of all of the cited references. Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 28.

As to claim 28, the Examiner states, "Smith discloses a system wherein a first threshold triggers a predictive failure analysis and a second threshold greater than the first threshold signifies a failure (see column 6 lines 6-20)." However, Applicant submits such alleged teaching does not describe "...implementing said protection switching operation..." Thus, Applicant submits claim 28 is in condition for allowance.

Rejection of claims 53 under 35 U.S.C. § 103(a):

The Examiner has rejected claim 53 under 35 U.S.C. § 103(a) as allegedly being unpatentable over U.S. Patent No. 6,978,398 (Harper '398 (which incorporates by reference Harper '266)) in view of U.S. Patent No. 4,245,342 of Entenman and of US Patent No. 6,771,440 of Smith.

Claim 53:

Regarding claim 53, the Examiner states as follows:

In regards to claim 53, Harper '398 in view of Entenman discloses the claim limitations as discussed above. Harper '398 further discloses:

wherein identifying the failure predicted one of said protected system elements includes determining that a failure prediction parameter associated with the failure predicted one of said protected system elements has exceeded a failure prediction parameter first threshold limit (see column 9 lines 6-10 and 25-28 of incorporated by reference Harper '266);

Harper further discloses confirming failure includes determining the protected system element has failed (see column 6 lines 21-25).

However, Harper '398 in view of Entenman fails to explicitly disclose:

confirming failure includes determining that the failure prediction parameter has exceeded a failure prediction parameter second threshold limit different than the failure prediction parameter first threshold limit.

Smith discloses a system wherein a first threshold triggers a predictive failure analysis and a second threshold greater than the first threshold signifies a failure (see column 6 lines 620).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to combine the teachings of Harper, Entenman, and Smith to include a second threshold that signifies a failure in addition to a first threshold that predicts a failure, thus indicating confirming failure includes determining that the failure prediction parameter has exceeded a failure prediction parameter second threshold limit different than the failure prediction parameter first threshold limit. A person of ordinary skill in the art could have been motivated to combine the teaching because Harper discloses a first threshold that predicts a failure is to follow (see column 9 lines 7-14 and lines 25-30 of incorporated by reference Harper '266) and is further concerned with dignifying a system element has failed (see column 6 lines 525) and having a second threshold that signifies a failure, as per teachings of Smith (see column 6 lines 6-20), provides a known and suitable means to signifying the system element has failed.

With respect to claim 53, the Examiner alleges "A person of ordinary skill in the art could have been motivated to combine the teachings because Harper discloses a first threshold that predicts a failure is to follow (see column 9 lines 7-14 and lines 25-30 of incorporated by reference Harper '266) and is further concerned with signifying a system element has failed (see column 6 lines 5-25) and having a second threshold that signifies a failure, as per teachings of Smith (see column 6 lines 6-20), provides a known and suitable means to signifying the system element has failed." While the Examiner alleges various teachings with respect to different references, even assuming arguendo the merit of the Examiner's allegations, Applicant submits "a patent composed of several elements is not proved obvious merely by demonstrating that each of its elements is, independently, known in the prior art." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 405, 418 (2007). While the Examiner relies on alleged teachings of the Entenman '342, Harper et al. '398, Downes et al. '761, and Smith '440 references, Applicant notes the Smith '440 reference is classified in different U.S. classifications and appears to have been subjected to mutually exclusive fields of search as compared to the Entenman '342 and Downes et al. '761 references. Thus, Applicant submits one of ordinary skill in the art would not have been led to attempt to combine the alleged teachings. Applicant submits the Examiner has not provided a plausible rationale as to why the prior art references would have worked together to render the claims obvious. *Power-One, Inc. v. Artesyn Techs., Inc.*, 599 F.3d 1343 (Fed. Cir. 2010). As an example, Applicant submits the Examiner has alleged motivation only as to combining "the teachings" of "Harper,...as per teachings of Smith," but has not alleged motivation to combine alleged teachings of all of the cited references. Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 53.

Regarding claim 53, Applicant submits the cited portions of the cited references fail to render obvious the subject matter of claim 53. As one example, Applicant submits the cited portions of the cited references fail to teach or suggest "identifying the failure predicted one of said protected system elements includes determining that a failure prediction parameter associated with the failure predicted one of said protected system elements has exceeded a failure prediction parameter first threshold limit." While the Examiner cites "(see column 6 lines 6-20)" of the Smith reference as allegedly disclosing "a system wherein a first threshold triggers a predictive failure analysis and a second threshold greater than the first threshold signifies a failure," Applicant submits such alleged teaching, specifically "wherein a first threshold triggers a predictive failure analysis," teaches away from the subject matter of claim 53. Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 53. Therefore, Applicant submits claim 53 is in condition for allowance.

Rejection of claims 54 under 35 U.S.C. § 103(a):

The Examiner has rejected claim 54 under 35 U.S.C. § 103(a) as allegedly being unpatentable over U.S. Patent No. 6,978,398 of Harper '398 in view of U.S. Patent No. 4,769,761 of Downes et al.

Claim 54:

Regarding claim 54, the Examiner states as follows:

In regards to claim 54, Harper '398 discloses an apparatus capable of facilitating protection switching, comprising:

a plurality of protected system element(see column 4 lines 23-27).

a protection system element including a data processor and capable of providing protection switching functionality for at least one of said protected system elements (see column 2 lines 23-26).

a data processor program wherein the data processor program is capable of enabling the protection system elements to facilitate (see column 2 lines 23-26.)

identifying a failure predicted one (see column 2 lines 19-23) of a plurality of protected system elements (see column 4 lines 23-27).

implementing a protection switching operation for switching designated information from the failure predicted one of said protected system elements to a protection system element (see column 2 lines 23-26).

However, Harper fails to explicitly disclose:

wherein identifying the failure predicted on of said protected system elements includes determining the rate of change of element demerit points for one of said protected system elements has exceeded a predetermined element demerit point rate of change threshold limit.

Downes discloses the concept of predicting a failure upon determination the error count over a selected number of operations is above a criterion or threshold (see column 1 lines 60-65).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to combine the teachings of Harper and Downes to further including predicting a failure upon determination the error count over a selected number of operations is above a criterion or threshold, thus indicating wherein identifying the failure predicted on of said protected system elements includes determining the rate of change of element demerit points for one of said protected system elements has exceeded a predetermined element demerit point rate of change threshold limit. A person of ordinary skill in the art could have been motivated to combine the teachings because Harper is concerned with detecting degradation of performance of a computer system (see column 1 lines 60-65), and monitoring the error count over a selected number of operations, as per teachings of Downes (see column 1 lines 60-65), constitutes as suitable known means to detect degradation of performance of a computer system.

With respect to claim 54, the Examiner alleges "A person of ordinary skill in the art could have been motivated to combine the teachings because Harper is concerned with detecting degradation of performance of a computer system (see column 1 lines 60-65), and monitoring the error count over a selected number of operations, as per teachings of Downes (see column 1 lines 60-65), constitutes as suitable known means to detect degradation of performance of a computer system." While the Examiner alleges various teachings with respect to different references, even assuming arguendo the merit of the Examiner's allegations, Applicant submits "a patent composed of several elements is not proved obvious merely by demonstrating that each of its elements is, independently, known in the prior art." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 405, 418 (2007). While the Examiner the relies on alleged teachings of the Entenman '342, Harper et al. '398, and Downes et al. '761 references, Applicant notes the Harper et al. '398 reference is classified in different U.S. classifications and appears to have been subjected to mutually exclusive fields of search as compared to the Entenman '342 and Downes et al. '761 references. Thus, Applicant submits one of ordinary skill in the art would not have been led to attempt to combine the alleged teachings. Applicant submits the Examiner has not provided a plausible rationale as to why the prior art references would have worked together to render the claims obvious. *Power-One, Inc. v. Artesyn Techs., Inc.*, 599 F.3d 1343 (Fed. Cir. 2010). As an example, Applicant submits the Examiner has not cited any portion of any of the cited references with respect to the Examiner's allegation of "...to detect degradation of performance of a computer system." Furthermore, while the Examiner cites "(see column 1 lines 60-65)" as to "Harper is concerned with detecting degradation of performance of a computer system," Applicant sees no

teaching as to "detecting..." in the cited portion of the cited reference. Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to claim 54.

Regarding claim 54, Applicant submits the cited portions of the cited references fail to render obvious the subject matter of claim 54. As one example, Applicant submits the cited portions of the cited references fail to teach or suggest "identifying a failure predicted one of a plurality of protected system elements." While the Examiner cites, "(see column 2 lines 19-23)" and "(see column 4 lines 23-27)" of the Harper '398 reference, Applicant submits the cited portions of the cited reference recite "In a third aspect, a method (and system) of maintaining performance of a primary node in a computer system, includes monitoring the primary node of the computer system, determining whether the primary node is failing or about to fail, and migrating the state of the primary node to..." and "Indeed, in a cluster system having more than two nodes, the secondary node 101B may not know which primary node 101A is going to fail until the failure is predicted, so it cannot have the primary node's application already running." As another example, Applicant submits such portion of such reference fails to teach or suggest, for example, "a plurality of protected system elements." Rather, Applicant submits col. 2, lines 19-23, of the cited reference, as cited by the Examiner, appears to describe merely "...monitoring the primary node..., determining whether the primary node is failing or is about to fail..." Thus, Applicant submits claim 54 is in condition for allowance.

Regarding claim 54, Applicant submits Downes' teaching as to clearing the "exception log" appears to delete the "error counts." Applicant submits, while the Examiner alleges "Downes discloses the concept of predicting a failure upon determination the error count over a selected number of operations is above a criterion or threshold (see column 1 lines 60-65)," deleting the "error counts" upon which Downes apparently depends would prevent "determining the rate of change of element demerit points..." even if the teachings of the cited portion of the Downes reference did disclose the subject matter alleged by the Examiner, which Applicant disputes.

As Applicant previously stated, as one example, Applicant submits the cited portions of the cited references fail to teach or suggest "identifying a failure predicted one of a plurality of protected system elements." While the Examiner cites, "(see column 2 lines 19-23)" and "(see column 4 lines 23-27)" of the Harper '398 reference, Applicant submits the cited portions of the cited reference recite "In a third aspect, a method (and system) of maintaining performance of a primary node in a computer system, includes monitoring the primary node of the computer system, determining whether the

primary node is failing or about to fail, and migrating the state of the primary node to..." and "Indeed, in a cluster system having more than two nodes, the secondary node 101B may not know which primary node 101A is going to fail until the failure is predicted, so it cannot have the primary node's application already running." As another example, Applicant submits such portion of such reference fails to teach or suggest, for example, "a plurality of protected system elements." Rather, Applicant submits col. 2, lines 19-23, of the cited reference, as cited by the Examiner, appears to describe merely "...monitoring the primary node..., determining whether the primary node is failing or is about to fail...." Thus, Applicant submits claim 54 is in condition for allowance.

Allowance of claims 37-44 and 55 and objection to claims 4, 6-8, 14, 20-22, 31-33, and 46-48:

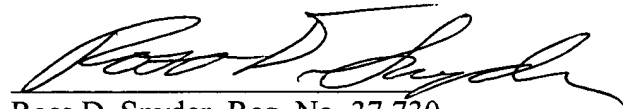
The Examiner has allowed claims 37-44 and 55 and has objected to claims 4, 6-8, 14, 20-22, 31-33, and 46-48 as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

In conclusion, Applicant has overcome all of the Office's rejections, and early notice of allowance to this effect is earnestly solicited. If, for any reason, the Office is unable to allow the Application on the next Office Action, and believes a telephone interview would be helpful, the Examiner is respectfully requested to contact the undersigned attorney.

Respectfully submitted,

Date

06/13/2011



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